

Denver Journal of International Law & Policy

Volume 45
Number 4 *Summer*

Article 8

April 2020

Vol. 45, no. 4: Full Issue

Denver Journal International Law & Policy

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Recommended Citation

45 Denv. J. Int'l L. & Pol'y (2017).

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Denver Journal

of International Law and Policy

VOLUME 45

NUMBER 4

SUMMER-2017

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THE TRADE FACILITATION AGREEMENT: BUILDING FAITH IN INTERNATIONAL TRADE IN AN UNCERTAIN TIME

Ashley Kincaid Lloyd*

I. INTRODUCTION

It is often theorized that multilateral trade can act as a stabilizing conduit for peace despite tumultuous governments, economic crisis, or social unrest.¹ Facilitating such trade in a pragmatic multilateral way has been a challenging project, but on February 22, 2017, the groundbreaking Trade Facilitation Agreement (TFA) entered into force.² The TFA is “the first new multilateral agreement in the nearly twenty-year history” of the World Trade Organization (WTO).³

“Trade facilitation” is defined by the United Nations Economic Commission for Europe (UNECE) with the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) as “the simplification, standardization and harmonization of procedures and associated information flows” required to move goods from seller to buyer and to make payment.⁴ In the WTO context, trade facilitation primarily refers to reforming “border management processes so as to make import and export transactions more transparent, predictable and efficient.”⁵ Bernard Hoekman states, “[a]n even broader view of trade facilitation is to include

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1. *The WTO Can...Contribute to Peace and Stability*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif0e/10thi09_e.htm [hereinafter *The WTO Can*] (“When the world economy is in turmoil, the multilateral trading system can contribute to stability. Some would argue that this can even contribute to international peace. History is littered with examples of trade disputes escalating into armed conflict. It’s a claim that should not be exaggerated, but there is truth in it. If we understand why, we have a clearer picture of what the system actually does.”).

2. *WTO’s Trade Facilitation Agreement Enters Into Force*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/news_e/news17_e/fac_31jan17_e.htm.

3. *Chapter II: The World Trade Organization*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/sites/default/files/Chapter%20II%20The%20World%20Trade%20Organization.pdf>; see also *Advance Trade Facilitation*, U.S. CHAMBER OF COMMERCE (Sept. 15, 2016, 10:30 AM), <https://www.uschamber.com/issue-brief/advance-trade-facilitation> (“Its formal adoption on Thanksgiving Day 2014 made it the first multilateral trade agreement reached since the WTO’s founding.”).

4. *UNECE with UN/CEFACT, TRADE FACILITATION IMPLEMENTATION GUIDE*, <http://tfig.unece.org/contents/org-unece-with-uncefact.htm>.

5. Bernard Hoekman, *The Bali Trade Facilitation Agreement and Rulemaking in the WTO: Milestone, Mistake or Mirage?* 4 (EUI Working Papers RSCAS 2014/102), http://cadmus.eui.eu/bitstream/handle/1814/33031/RSCAS_2014_102.pdf?sequence%20nce=1.

any measure that promotes trade.”⁶ Trade facilitation, generally, is “now widely considered a necessary complement to broader economic liberalization—essential to reap [trade facilitation’s] full benefits.”⁷

One of the most beneficial aspects of trade facilitation is that it creates stability in markets and thus certainty and confidence in traders, importers, and exporters.⁸ Extensive empirical data at this time exists to suggest trade facilitation can significantly boost trade, “diversification along the extensive margin of trade, and increase aggregate welfare.”⁹ Arguably, the TFA has far reaching effects, one is superseding the negative effects of high, as “trade facilitation has a larger effect than removing tariffs.”¹⁰ If one is inclined to embrace trade facilitation and accept the theory that trade *at least encourages* peace between nations, the TFA may be interpreted as a manifestation of the foregoing intuition that trade creates peace. Moreover, because the WTO’s allows states to retaliate against any state that violates WTO agreements, and as the TFA is the first agreement that all WTO members signed, there are binding and legal repercussions that make the TFA indisputably unique.

This Article is comprised of the following sections: (II) background of the TFA’s creation; (III) the ways in which protectionism hinders trade facilitation; (IV) a discussion of the TFA including: (A) its projected benefits, (B) the role of the Global Alliance, (C) implementing the TFA, and (D) regulating and enforcing the TFA despite protectionism in 2017; (V) non-protectionist critiques of the TFA; and (VI) concludes that the TFA will serve a significant purpose.

II. BACKGROUND

The WTO created the TFA as a natural consequence of the WTO’s work. This

6. *Id.*

7. Note by the Secretariat, *Developmental Aspects of the DOHA Round of Negotiations*, WT/COMTD/W/143/Rev.5 (Oct. 29, 2010), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=93870,88383,27224,56064,57970&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

8. See generally, C. Zaki, *An empirical assessment of the trade facilitation initiative: econometric evidence and global economic effects*, 13 WORLD TRADE REVIEW 103–130 (January 2014); see also Hoekman, *supra* note 5, at 4–5.

9. Hoekman, *supra* note 5, at 5; see generally Chad P. Brown & Douglas A. Irwin, *The GATT’s Stating Point: Tariff Levels circa 1947* (POLICY RESEARCH WORKING PAPER), <http://documents.worldbank.org/curated/en/935351468193733666/pdf/WPS7649.pdf>.

10. *Enabling Trade: Valuing Growth Opportunities*, World Economic Forum, <http://reports.weforum.org/global-enabling-trade-2013/a-reducing-supply-chain-barriers-to-trade-could-increase-gdp-up-to-six-times-more-than-removing-tariffs-they-have-been-under-managed-by-both-countries-and-companies/#view/fn-6> (“While the increases in trade from tariff elimination are similar in magnitude to those associated with trade facilitation, the increases in GDP are many times greater. The reason is that the kinds of efficiencies brought about by improved trade facilitation are more powerful than those associated with tariff reduction. Reductions in supply chain barriers improve the efficiency of the movement of goods, in a manner analogous to an increase in transportation productivity, thereby recovering resources that are otherwise wasted. In contrast, tariff reductions primarily represent a reallocation of resources within an economy, while capturing only the more modest inefficiency created by the tax.”).

section will summarize the WTO's history from its inception, through the Doha Development Agenda discussions, and finally to the Bali Ministerial Conference that culminated in the TFA's creation and entry into force. The WTO is an intergovernmental organization (IGO)¹¹ created in 1995 in Geneva, Switzerland.¹² Its creation arose from the Uruguay Round Agreement,¹³ but its establishment occurred through Article 1 of the Agreement Establishing the World Trade Organizations' entry into force.¹⁴ At the WTO's inaugural Ministerial Conference in 1996, trade facilitation discussions arose as a top priority.¹⁵ Trade increased presumably from the certainty that the WTO rules provided for businesses and countries. The rules also had positive effect on equality.¹⁶ The WTO held ten Ministerial Conferences to date, with an eleventh scheduled for December 2017 in Buenos Aires, Argentina.¹⁷

The Doha Conference was a landmark decision that paved the way for the TFA's creation. Controversy arising from popular movements against

11. *Intergovernmental Organizations (IGOs)*, HARVARD LAW SCHOOL, <http://hls.harvard.edu/dept/opia/what-is-public-interest-law/public-service-practice-settings/public-international-law/intergovernmental-organizations-igos/> ("The main purposes of IGOs were to create a mechanism for the world's inhabitants to work more successfully together in the areas of peace and security, and also to deal with economic and social questions. In this current era of increasing globalization and interdependence of nations, IGOs have come to play a very significant role in international political systems and global governance.")

12. *The WTO*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/thewto_e.htm (also known as the Marrakesh Agreement).

13. Uruguay Round Agreement: Marrakesh Agreement Establishing the World Trade Organization, WORLD TRADE ORGANIZATION, https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

14. *Id.*

15. The First WTO Ministerial Conference, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/minist_e/min96_e/min96_e.htm ("Trade, foreign, finance and agriculture Ministers from more than 120 World Trade Organization Member governments and from those in the process of acceding to the WTO participated in a Ministerial Conference in Singapore from 9 to 13 December 1996. The Conference was the first since the WTO entered into force on 1 January 1995."); *see also* Hoekman, *supra* note 5, at 4 (stating the WTO's interest in Trade Facilitation arose from the international business community's concerns that product sharing and global sourcing suffered as a result of "inefficient border management procedures and controls.").

16. World Trade Organization, Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC, ¶ 2, https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm (Moreover, the Singapore Ministerial Declaration iterated the WTO's intent "to make the most of the possibilities that the multilateral system provides to promote sustainable growth and development while contributing to a more stable and secure climate in international relations.").

17. *See generally Ministerial Conferences*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/minist_e/minist_e.htm (Second: "Geneva, Switzerland between 18 and 20 May 1998"; third: "Seattle, Washington State, US between 30 November and 3 December 1999"; fourth "Doha, Qatar from 9 to 14 November 2001"; fifth: Cancún, Mexico from 10 to 14 September 2003"; sixth: "Hong Kong, China, 13–18 December 2005"; seventh: "Geneva, Switzerland, took place from 30 November to 2 December 2009"; eighth: "Geneva, Switzerland, from 15 to 17 December 2011"; ninth "Bali, Indonesia, from 3 to 7 December 2013"; and tenth: "Nairobi, Kenya, from 15 to 19 December 2015."); *see also Eleventh WTO Ministerial Conference*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/minist_e/mc11_e/mc11_e.htm.

“megacorporations” prior to 2001¹⁸ did not deter the WTO from continuing to strive towards its goals to work on efficient trade facilitation.¹⁹ To this end, the WTO members attending the Doha Round focused on reducing import taxes, or “tariffs”, on a variety of trade goods.²⁰ The Trade Negotiations Committee had leadership and a mission to begin crafting trade facilitation among WTO members. Following the Cancún Conference, “WTO members formally agreed to launch negotiations on trade facilitation in July 2004,” based upon Annex D: *Modalities for Negotiations on Trade Facilitation* (Modalities), included in the July Package.²¹ The Modalities also directed WTO members to improve and clarify freedom of transit, “fees and formalities connected with importation and exportation[,]” and ways to publish and administer trade regulations.²²

The United States found India and China’s agricultural policies “unconscionable”,²³ and this breakdown frustrated many WTO members.

18. Paige McClanahan, *Doha Round Trade Talks- Explainer*, GUARDIAN (Sept. 3, 2012, 10:17AM), <https://www.theguardian.com/global-development/2012/sep/03/doha-round-trade-talks-explainer> (“The activists feared the talks would let big corporations plunder the economies of the developing world, restrict poor countries’ access to affordable drugs and prevent developing nations from protecting their domestic economic interests.”); *see also* Derek Brown, *The Battle in Seattle*, GUARDIAN (Dec. 1, 1999, 1:14PM), <https://www.theguardian.com/news/1999/dec/01/1>; *Timeline: World Trade Organization*, BBC NEWS, http://news.bbc.co.uk/2/hi/europe/country_profiles/2430089.stm (In 1999, over 30,000 protesters disrupted WTO Ministerial Conference in Seattle, Washington.).

19. *What We Do*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm (The Doha Round concluded the Doha Development Agenda, which was the “first to focus on helping developing countries join the global marketplace, and boost their economies as a result. Moreover, the Doha Round articulated its underlying philosophy of creating a “Single Undertaking” such that “nothing is agreed until everything is agreed” regarding Trade Facilitation.”).

20. *Tariff*, INVESTOPEDIA.COM, <http://www.investopedia.com/terms/t/tariff.asp> (A “Tariff” is “A tax imposed on imported goods and services. Tariffs are used to restrict trade, as they increase the price of imported goods and services, making them more expensive to consumers.”); *see also* McClanahan, *supra* note 18.

21. Doha Work Programme: Decision Adopted by the General Council on 1 August 2004, WT/L/579, Annex D, para. 10, p. D-1, https://www.wto.org/english/tratop_e/dda_e/ddadraft_31jul04_e.pdf (The Modalities specifically addressed how to begin negotiating Trade Facilitation by requiring the Trade Negotiations Committee to establish a Negotiating Group and appoint its Chair to plan and schedule negotiations); *Id.* section g, p. 3 (“taking note of the work done on trade facilitation by the Council for Trade in Goods under the mandate in paragraph 27 of the Doha Ministerial Declaration and the work carried out under the auspices of the General Council both prior to the Fifth Ministerial Conference and after its conclusion, the General Council decides by explicit consensus to commence negotiations on the basis of the modalities set out in Annex D to this document.”).

22. *Early years – from Singapore to Doha*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/tradfa_e/tradfa_intro_e.htm (“Under this mandate, members are directed to clarify and improve GATT Article V (Freedom of Transit), Article VIII (Fees and Formalities connected with Importation and Exportation), and Article X (Publication and Administration of Trade Regulations)” ...Shortly thereafter, on October 12, 2004, “the Trade Negotiations Committee established the Negotiating Group on Trade Facilitation and appointed Ambassador Muhamad Noor of Malaysia as its Chairperson.”).

23. Alan Beattie & Frances Williams, *Doha Trade Talks Collapse*, FINANCIAL TIMES (July 29,

However, there was optimism.²⁴ The tone surrounding the Doha Agenda in 2012 and 2013 drastically changed.²⁵ Members, through alliances or individually, submitted hundreds of proposals for the Negotiating Group to consider.²⁶ At the 2013 Bali Ministerial Conference, Members worked collectively to complete the Bali Package, which included the TFA.²⁷ Finally, after years of disagreement and months of the Negotiating Group's revisions, the Bali proposals became the TFA's final text.²⁸ The momentum that began in Bali continued through to the 2015 Ministerial Conference in Kenya. At the Kenya Round, "WTO members agreed on several significant issues within the Doha Development Agenda and outlined the way forward in WTO negotiations."²⁹ Within two short years, the TFA entered into force on February 22, 2017.³⁰

III. PROTECTIONISM ADVERSELY AFFECTS TRADE FACILITATION

Historically, any given state was skeptical of trusting its trade partners to have perpetually open markets and instead opted for "protectionism."³¹ Protectionism refers to governmental efforts to restrict international trade.³² The Great

2008), <https://www.ft.com/content/0638a320-5d8a-11dd-8129-000077b07658> (India and China believed protected its impoverished domestic farmers from external agricultural import surges, but the United States disagreed.); *see also* McClanahan, *supra* note 18 (Susan Schwab also suggested if the United States had relented to India and China "we could have come out with an outcome that rolled the global trading system back three years, or five years, or 30 years: 30 years of progress."); Heather Stewart, *Tariffs: WTO talks collapse after India and China clash with America over farm products*, GUARDIAN (July 20, 2008, 12:01AM), <https://www.theguardian.com/world/2008/jul/30/wto.india>.

24. Stewart, *supra* note 23.

25. World Trade Organization, USTR.GOV, <https://ustr.gov/sites/default/files/Chapter%20II%20The%20World%20Trade%20Organization.pdf>.

26. *Early years – from Singapore to Doha*, *supra* note 22; *see also* Negotiating An Agreement on Trade Facilitation, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/tradfa_e/tradfa_negoti_e.htm.

27. World Trade Organization, *supra* note 25.

28. *Early years – from Singapore to Doha*, *supra* note 22; *see also* Negotiating An Agreement on Trade Facilitation, *supra* note 26 ("WTO members had achieved a consensus text with 13 articles and a special section dealing with special and differential treatment provisions. Among the issues addressed in the Agreement are: norms for the publication of laws, regulations and procedures, including Internet publication; provision for advance rulings; disciplines on; fees and charges and on penalties; pre-arrival processing of goods; use of electronic payment; guarantees to allow rapid release of goods; use of "authorized operators" schemes; procedures for; expedite shipments; faster release of perishable goods; reduced documents and formalities with common customs standards; promotion of the use of a single window; uniformity in border procedures; temporary admission of goods; simplified transit procedures; provisions for customs cooperation and coordination.").

29. Doha Development Agenda, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/policy/eu-and-wto/doha-development-agenda/>.

30. Trade Facilitation, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm.

31. *The WTO Can*, *supra* note 1.

32. *Protectionism*, INVESTOPEDIA.COM, <http://www.investopedia.com/terms/p/protectionism.asp#ixzz4ZCCURiRx> ("Protectionism" refers to "government actions and policies that restrict or restrain international trade, often done with the intent of protecting local businesses and jobs from foreign competition. Typical methods of protectionism are

Depression, that began in 1929, caused competing states “to raise trade barriers and protect domestic production and employment[,]” which contributed to an impoverished international market.³³ The Great Depression was ruinous for trade, jobs, and industries, as the value of world trade—\$3 billion USD in 1929—crashed to \$1 billion USD by March 1933.³⁴

After the WTO's creation, its goals centered around stabilizing world economies and keeping markets open in the face of economic crisis. The WTO was partially credited with stabilizing the world economy in the wake of the 2007 financial crisis, despite domestic pressure on governments to succumb to protectionist policies.³⁵ Protectionism in domestic state policies has not disappeared, as evidenced in India's 2008 government, the United States' 2017 leadership, and in indigenous communities. India and the United States struggled to agree on trade facilitation mechanisms regarding agriculture.³⁶ As international criticism of India's domestic agriculture policies began to surface,³⁷ the more India's domestic citizenry began to agree that “the WTO issue is a relic of India's past with anti-trade bias.”³⁸ Moreover, the previously-held belief that India was singled out by the WTO was abandoned in popular rhetoric.³⁹ While the attitude in India's government changed from protectionist to pragmatic in conformity with the global trend, the United States' 2017 policies abandoned liberalized trade in favor of protectionism.

On January 23, 2015, the United States, through its then-existing Trade

tariffs and quotas on imports and subsidies or tax cuts granted to local businesses. The primary objective of protectionism is to make local businesses or industries more competitive by increasing the price or restricting the quantity of imports entering the country.”).

33. *The WTO Can*, *supra* note 1.

34. *Id.*; see also World Trade Statistical Review 2016, WORLD TRADE ORGANIZATION, https://www.wto.org/english/res_e/statis_e/wts2016_e/wts2016_e.pdf (stating that as of 2015, merchandise exports of WTO members totaled \$16.2 trillion USD).

35. *The WTO Can*, *supra* note 1; see also Matthieu Bussière et al., *Protectionist Responses to the Crisis: Global Trends and Implications* (EUROPEAN CENTRAL BANK) <https://www.ecb.europa.eu/pub/pdf/scpops/ecbocp110.pdf?a9e5d9a3d7fab9edc635261bb6dcblde> (“[E]vidence from surveys shows that public pressure for more economic protection has been mounting since the mid-2000s, and has possibly intensified since the start of the financial crisis. However, no World Trade Organization (WTO) member has retreated into widespread trade restrictions or protectionism to date.”).

36. See Eric Bellman & Rajesh Roy, *India Threatens to Block WTO Deal*, WALL STREET JOURNAL (July 17, 2014, 11:58AM), <https://www.wsj.com/articles/india-threatens-to-block-wto-deal-over-food-stockpiling-1405612719>.

37. Tim Worstall, *India Threatens to Derail WTO Deal Stockholding of Food; A Policy It Should Change Anyway*, FORBES (July 26, 2014, 3:10AM), <http://www.forbes.com/sites/timworstall/2014/07/26/india-threatens-to-derail-wto-deal-over-public-stockholding-of-food-a-policy-it-should-change-anyway/#580cee304aeb> (stating India's food for the poor system was described as “a great steaming dungpile of corruption and inefficiency.”).

38. *Why is India Opposing the Trade Facilitation Agreement?*, QUORA, <https://www.quora.com/Why-is-India-opposing-the-Trade-Facilitation-Agreement>.

39. *Id.* (“India buying huge amount of wheat and rice from farmers at highly unsustainable prices and then finding it rot in the non-existent godowns (thereby distorting prices for everyone else)” was deemed problematic); Worstall, *supra* note 37.

Representative Michael Froman, formally accepted the TFA citing its positive aspects for expedient trade.⁴⁰ This formal affirmation was confirmed by the WTO Director-General Roberto Azevedo on January 28, 2015.⁴¹ The United States' acceptance was not merely based on global potential gains. The United States also encouraged speedy implementation of the TFA by offering to help developing nations implement TFA's policies.⁴² In December 2016, United States Ambassador Michael Punke confirmed the United States' "commitment to open markets and to the rules-based multilateral trading system embodied in the WTO."⁴³

Despite Ambassador Punke's declaration that the United States continued to dedicate itself to open borders and multilateral pragmatism at the end of 2016, by January 2017, new leadership proved itself to be wholly protectionist. For example, on January 24, 2017, an executive order ended the United States' involvement in the Trans-Pacific Partnership (TPP);⁴⁴ an action diametrically opposed to Ambassador Punke's address to the WTO Trade Policy Review, which heralded the United States' "vigorous pursuit of bilateral and regional arrangements aimed at reinforcing and complementing the multilateral trading system."⁴⁵

Thus far, the United States' 2017 protectionist policies have both destroyed an opportunity for involvement in the TPP⁴⁶ and directly contravened its officially stated commitment to pragmatic multilateralism⁴⁷ in favor of imposing high tariffs.⁴⁸ It is these protectionist steps, combined with a threat to "pull out" of the

40. United States Takes Final Step Toward WTO Trade Facilitation Agreement, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/january/united-states-takes-final-step> ("Michael Froman formally delivered the United States' letter of acceptance of the WTO Trade Facilitation Agreement to WTO Director General Roberto Azevedo today in Davos, Switzerland.").

41. Protocol Amending the Marrakesh Agreement, Establishing the World Trade Organization, Done at Geneva on 27 November 2014, Agreement on Trade Facilitation, Notification of Acceptance; WT/Let/1029.

42. United States Takes Final Step Toward WTO Trade Facilitation Agreement, *supra* note 40 ("We are working with developing countries to help support effective implementation of this Agreement," [...] "In fact, we are already considering how to best support countries who are committed to implementation—teaming up with other governments and the private sector.").

43. Ambassador Michael Punke, Statement of the United States at the 13th WTO Trade Policy Review of the United States of America (Dec. 19, 2016), <https://ustr.gov/about-us/policy-offices/press-office/speechestranscripts/2016/december/Statement-US-13-WTO-TPR-USA>.

44. Charles Riley, *Trump's Decision to Kill TPP Leaves Door Open for China*, CNN MONEY (Jan. 24, 2017, 6:31AM), <http://money.cnn.com/2017/01/23/news/economy/tpp-trump-china/>.

45. Ambassador Michael Punke, *supra* note 43.

46. *Id.* ("According to analysis supported by the Peterson Institute for International Economics, if TPP were implemented, global exports would increase (compared to the baseline) by US \$ 1.1 trillion (2015 dollars) by 2030, and global real income would increase by US \$ 492 billion.").

47. *Id.* (stating "this multilateral system is so vitally important to" the United States of America).

48. Patrick Gillespie, *NAFTA: What it is, and Why Trump Hates It*, CNN MONEY (Nov. 15, 2016, 5:17PM), <http://money.cnn.com/2016/11/15/news/economy/trump-what-is-nafta/> ("Top of Trump's wish list is to renegotiate or "terminate" NAFTA—the North American Free Trade Agreement. He also wants to slap a 35% tax on goods, such as Ford (F) cars, that are made in Mexico and sold in the U.S.").

WTO,⁴⁹ that indicate “Donald Trump is prepared to risk precipitating a trade war” that creates worry.⁵⁰ Considering the current United States trade policies, it is ironic that the United States “became one of the first countries to try to reverse” the 1930’s global protectionist movement.⁵¹ Trade regimes and peace are interrelated. When trade barriers become insurmountable, war is imminent.

Faith in liberalized multilateral pragmatism may win out over protectionism; for, at the end of the day, TFA is fully entered in force, and creates certain rights and obligations on its signatories.

IV. THE TRADE FACILITATION AGREEMENT

The TFA is comprised of three main sections. Section I of the TFA (Section I) tells us that this agreement is binding and requires a commitment to use “best endeavors”⁵² to enforce the TFA.⁵³ Section I covers: publication and availability of information; disciplines and fees about importation and exportation penalties; border agency cooperation, release, and clearance of goods; enhancing non-discrimination and transparency; goods under custom’s control; formalities in importing and exporting; freedom of transit; and customs cooperation.⁵⁴

Interestingly, the Section I standard is applied to developing and least-developed countries on a sliding scale. This sliding scale, covered in Section II, allows for “special and differential treatment” provisions that may be invoked by nations that qualify as developing or least-developed. Section II of the TFA creates three categories of nations that qualify as developing or least-developed countries and various ways to implement the TFA.⁵⁵ Section II allows such countries to *unilaterally* determine *when* to “apply the various provisions laid out in Section I.”⁵⁶ However, Section II also informs applicable states how to notify the Committee of the stage or progress on TFA implementation.⁵⁷ Moreover, Section II discusses the methods available to change categories between A, B, or C, and how to seek support on implementing the TFA at various stages.⁵⁸

49. Todd N. Tucker, *What would be the consequences of pulling out of the WTO?*, TODD N. TUCKER: UNDER TWO CEILINGS (July 26, 2016, 3:23PM), <https://toddn Tucker.com/2016/07/26/what-would-be-the-consequences-of-pulling-out-of-the-wto/>.

50. John Plender, *Trump Trade Blind to Global Cost of Protectionism*, FINANCIAL TIMES (Jan. 31, 2017), <https://www.ft.com/content/2bee373a-e786-11e6-893c-082c54a7f539>.

51. Kyle Bagwell, Robert W. Staiger, & Alan O. Sykes, *Border Instruments*, in LEGAL AND ECONOMIC PRINCIPLES OF WORLD TRADE LAW 29 (Cambridge University Press 2013).

52. Best Endeavors, INVESTOPEDIA, <http://www.investopedia.com/terms/b/best-endeavors.asp> (Best endeavors is “[a] term commonly found in commercial contracts, that places upon the party given such an undertaking, the obligation to use all efforts necessary to fulfill it. “Best endeavors” places a party under a stricter obligation than “reasonable endeavors.”).

53. Hoekman, *supra* note 5.

54. Agreement on Trade Facilitation, WT/L/931 (July 15, 2014), http://tfig.unece.org/pdf_files/931.pdf [hereinafter Trade Facilitation Agreement].

55. *Id.* § II, art. 14.

56. Hoekman, *supra* note 5.

57. Trade Facilitation Agreement, *supra* note 54, § II, art. 15-18.

58. *Id.* § II, art. 19-22.

Section III covers institutional arrangements for an international and domestic Committee on Trade Facilitation, including its roles, obligations, and how to conduct meetings.⁵⁹ This is followed by final provisions including notice that the TFA's provisions are binding on all members, and that members are bound to resolve disputes as outlined in Articles XXII and XXIII of GATT 1994.⁶⁰

This section discusses the TFA by highlighting: (A) the TFA's projected beneficial effects, (B) the Global Alliance, (C) implementing the TFA, and (D) regulating and enforcing the TFA in the face of protectionism. These sections are intended to explore some of the more unique aspects of this multilateral agreement, and whether these qualities create an agreement that can overcome protectionism.

A. Projected Effects of the TFA

The projected monetary benefits of TFA implementation are staggering: the TFA is estimated to reduce global trade costs from 12.5% to 17.5%.⁶¹ A study from the Organization for Economic Cooperation and Development (OECD) claimed a mere "[one] percent drop could save as much as \$40 billion in trade costs."⁶² This is a monumental amount of monies that will predominately benefit low to lower middle income countries and increase their opportunity to participate in trade.⁶³ In a 2016 report by the International Trade Center (ITC), in connection with United Nations Network of Experts for Paperless Trade and Transport in Asia and the Pacific (UNNExT) and the United Nations Economic and Social Commission for Asia and the Pacific (UN ESCAP) division, the TFA was described as benefitting income distribution and small and medium enterprises (SME).⁶⁴ Moreover, it is posited that the TFA "will also help developing countries attract more FDI (Foreign Direct Investment), increase customs revenues and reduce the incidence of corruption."⁶⁵

B. The Global Alliance for Trade Facilitation's Role

The Global Alliance for Trade Facilitation (GATF) consists of three major

59. *Id.* § III, art. 23–24.

60. *Id.*

61. *Implementation of the WTO Trade Facilitation Agreement: The Potential Impact on Trade Costs* (OECD), https://www.oecd.org/trade/WTO-TF-Implementation-Policy-Brief_EN_2015_06.pdf [Implementation of the WTO TFA] ("The potential cost reduction from a "full" implementation of the TFA is 16.5% of total costs for low income countries, 17.4% for lower-middle income countries, 14.6% for upper-middle income countries and 11.8% for OECD countries according to 2015 TFI data." "If countries limit themselves to the mandatory provisions of the agreement, the potential reduction reaches 12.6% for LICs, 13.7% for LMICs, 12.8% for UMICs and 10.4% for OECD countries.").

62. *Id.*

63. *Id.*

64. Making the WTO Trade Facilitation Agreement Work for SMEs: Mainstreaming Trade Facilitation in SME Development Strategies, ST/ESCAP/2748, <http://www.unescap.org/sites/default/files/MakingWTOFAWorkforSMEs.pdf>.

65. Mr. David Shark, Deputy Director-General, World Trade Organization, Statement on Benefits of the WTO's Trade Facilitation Agreement, https://www.wto.org/english/thewto_e/acc_e/TJKDDGSHARKTICTFASTATEMENT.pdf.

private sector organizations: (1) the International Chamber of Commerce (ICC); (2) the United States Chamber of Commerce-affiliated⁶⁶ Center for International Private Enterprise (CIPE); and (3) the World Economic Forum (WEF).⁶⁷ The United States Chamber of Commerce took a leading role in support of the TFA, which led to its formal adoption.⁶⁸ Garnering the full potential of a multilateral agreement on the TFA's scale required the government, private sector, TFA members, and IGO's to work together for a common goal.⁶⁹ Developed nations including the governments of Canada, Germany, the United Kingdom, and the United States created the GATF alongside private sector international organizations.⁷⁰ GATF partners worked diligently and closely to craft a "unique public-private platform to leverage business expertise, leadership and resources to support effective trade facilitation reforms measured by real-world business metrics."⁷¹

Rather than being an enforcement mechanism on the back-end of potential TFA disputes, the GATF is tasked with creative problem solving in TFA implementation from the *beginning*. Having such support on the front-end of implementing the TFA's ambitious goals could quell many foreseeable problems with TFA compliance before issues of corruption or faulty implementation could arise. The GATF, on the front-end, thus promotes proper implementation and makes the TFA more self-enforcing than was previously thought.⁷²

C. Implementation

The ICC argues that implementing the TFA's potential for maximum beneficial results can be a smooth transition if domestic governments make the following four key points— "business engagement, ambition, speed and a coherent approach to implementation"⁷³—permanently at the top of their respective agendas. The ICC has repeatedly emphasized that businesses and governments must work

66. Advance Trade Facilitation, U.S. CHAMBER OF COMMERCE (Aug. 15, 2017, 9:00PM), <https://www.uschamber.com/issue-brief/advance-trade-facilitation>.

67. See About the Alliance, TRADE FACILITATION, <http://www.tradefacilitation.org/about-the-alliance.html>.

68. See INTERNATIONAL CHAMBER OF COMMERCE: WTO TRADE FACILITATION AGREEMENT (TFA), [http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/customs-and-trade-facilitation/wto-trade-facilitation-agreement-\(tfa\)/](http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/customs-and-trade-facilitation/wto-trade-facilitation-agreement-(tfa)/).

69. Advance Trade Facilitation, U.S. CHAMBERS OF COMMERCE (Aug. 15, 2017, 9:00PM), <https://www.uschamber.com/issue-brief/advance-trade-facilitation>.

70. *Id.*

71. *Id.*; see also INTERNATIONAL CHAMBER OF COMMERCE: WTO TRADE FACILITATION AGREEMENT (TFA), *supra* note 68.

72. Hoekman, *supra* note 5 ("The weakness of the TFA in terms of offering foreign export interests strong mechanisms to enforce its provisions and thus to make the TFA self-enforcing means other institutional arrangements can and must be used to support implementation, including regional integration arrangements and concerted action by multilateral development agencies. The epistemic community that supported the TFA effort does not need the WTO to continue to provide support to governments and stakeholders that aims to improve trade facilitation performance.").

73. See INTERNATIONAL CHAMBER OF COMMERCE: WTO TRADE FACILITATION AGREEMENT (TFA), *supra* note 68.

together “to cement opportunities the TFA will bring for development, job creation and poverty reduction.”⁷⁴ With the GATF and Trade Facilitation Agreement Facility (TFAF)⁷⁵ poised to help countries design implementation of the TFA, these resources are likely to create a smooth and organized partial or full implementation.

There are three categories of provisions that apply to different countries based on their needs and stage of economic development: Category A, Category B, and Category C.⁷⁶ Category A contains provisions that a developing country or a least-developed country members to the TFA designate for implementation once the TFA is entered into force.⁷⁷ In the case of a least-developed country member, implementation must begin within one year after, which is February 22, 2018.⁷⁸ Category B contains provisions allowing developing or least-developed countries to designate “for implementation on a date after a transitional period of time following” the TFA’s entry into force.⁷⁹ Category C contains provisions similar to Category B, with the additional requirement that Category C states acquire the capacity to implement the TFA with assistance or support for capacity building.⁸⁰ Such support “may take the form of technical, financial, or any other mutually agreed form of assistance provided.”⁸¹ The TFAF’s Work Plan for 2017 has nine major tasks: (1) match Category C countries with developed nations; (2) create a grant funding program; (3) create and facilitate national workshops on implementing the TFA; (4) create regional workshops similar to (3); (5) assessing national needs; (6) create dedicated thematic workshops; (7) educate chairs of national trade facilitation committees; (8) include training materials on the TFAF website; and (9) facilitate outreach and promotional activities for the TFA.⁸²

The TFA as implemented has already circumvented some difficulties that countries, like Brazil, faced in changing domestic laws that encouraged trade facilitation measures. The difficulty historically arose between the competing interests of businesses that want simple, streamlined procedures for trade, and governments, which willingly adopt strict foreign trade measures.⁸³ WTO

74. *Id.*

75. About the Facility, WORLD TRADE ORGANIZATION, <http://www.tfafacility.org/about-the-facility> (The TFAF was “created at the request of developing and least-developed country (LDC) Members to help ensure that they receive the assistance they need to reap the full benefits of the Trade Facilitation Agreement, and to support the ultimate goal of full implementation of this new Agreement by all Members.”).

76. Trade Facilitation Agreement, *supra* note 54, § II, art. 14.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Workplan 2017, WORLD TRADE ORGANIZATION, <http://www.tfafacility.org/workplan-2017>.

83. Jose Marcio R. Rego Filho, *The Importance of the Agreement on Trade Facilitation to Brazil and the World Economy*, 26 J. INT’L TAX’N 52, 53 (Jun. 2015); see also INTERNATIONAL CHAMBER OF COMMERCE: WTO TRADE FACILITATION AGREEMENT (TFA), *supra* note 68 (“A report from the Peterson Institute for International Economics commissioned by the ICC Research Foundation estimates that the TFA has the potential to deliver an unprecedented stimulus to the world economy with

agreements are binding on those states who are members, and supersede domestic authority in principle. José Márcio Rego Filho, an associate with the Tax and International Trade Area of Pinheiro Neto Advogados, in Sao Paulo, Brazil argues the WTO's TFA will inherently prevent local authorities from discretionary trade facilitation procedures or costs, and further posits:

[E]xecution of the Agreement will not only bring direct benefits to the world economy [...] but also give new impetus to the WTO, creating a more favorable environment for negotiations of more complex and divergent matters, all of which is of utmost importance in enhancing the economic development of all WTO member countries.⁸⁴

Because of observable positive results in Brazil's implementation, the TFA appears to be a beneficial and innovative mechanism to promote trade while fostering necessary certainty.

D. TFA Regulation and Enforcement Despite Protectionism

The optimism surrounding the TFA should duly be met with skepticism as an agreement must be enforceable to have teeth.⁸⁵ A key consideration, then, must be how to ensure businesses and governments adhere to the TFA's policies to reap its benefits with confidence. The International Monetary Fund's (IMF) involvement could add teeth to the WTO's agreements, as the IMF's rules in combination with "WTO Agreements provide the legal basis for cooperation."⁸⁶ Over the last decade, drastic changes occurred in IMF and WTO global strategies from its policies in the 1990's that garnered criticism. To do this, it will be important to know whether there are mechanisms that can deter protectionist acts, or create binding consequences for noncompliance with the TFA. As Ambassador Punke noted:

WTO Members cannot have confidence in a system where WTO adjudicators overstep the boundaries agreed by WTO Members in the DSU and the WTO Agreement. And if Members do not have confidence that the WTO dispute settlement system will not add to or diminish their existing rights and obligations under agreements they have approved domestically, they will not have confidence that they can conclude new agreements and credibly say domestically what those new agreements mean.⁸⁷

Essentially, the concern is whether nations will commit to "the legally binding limits on their trade barriers and subsidies that they have also negotiated" if the

a boost of up to US\$1 trillion.").

84. Filho, *supra* note 83, at 53 ("[A]ccording to the International Chamber of Commerce (ICC), once implemented, the agreement could boost global trade by as much as U.S.\$1 trillion and lead to a 10% reduction in trade costs...").

85. *Have Teeth*, FREEDICTIONARY.COM, <http://idioms.thefreedictionary.com/have+teeth> (To "have teeth" a law "it has the power to make people obey it.").

86. Deborah E. Siegel, *Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements*, 96 AMERICAN J. INT'L LAW 561, 569, <https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/siegel.pdf>.

87. Ambassador Michael Punke, *supra* note 43.

available dispute settlement systems neither add to nor diminish rights and obligations.⁸⁸ The WTO acknowledges that dispute settlement mechanisms is “the central pillar of the multilateral trading system,” because absent a “means of settling disputes, the rules-based system would be less effective because the rules could not be enforced.”⁸⁹ Thus, the WTO’s official stance lies in enforceable hard law,⁹⁰ but only after negotiations between disputing states take place.⁹¹ According to economic and legal scholars, the WTO’s “dispute settlement system is widely considered one of the most successful international resolution systems.”⁹² However, because the WTO inherently relies on state consent,⁹³ thus, “even its hard-law texts contain certain forms of wording that locate them at the soft-law end of the spectrum, where effective litigation is difficult or impossible.”⁹⁴

The WTO’s binding agreements usually pertain to “transparency, fees and procedures that are imposed or applied by *customs* authorities[,]” rather than by blanket governmental leadership authorities.⁹⁵ Importantly, many scholars consider WTO obligations non-binding “in an international law sense[,]” though the WTO includes a branch that, by its name, would seem to encompass non-compliance—Dispute Settlement Understanding (DSU).⁹⁶ Some TFA “provisions can in principle be enforced through the WTO dispute settlement system. Others are of a “best endeavors nature” that is inherently subjective or “soft law[.]”⁹⁷ Best endeavors-type matters will include sensitive matters “e.g., [c]ustoms cooperation

88. *The WTO Can*, *supra* note 1 (“WTO agreements require governments to make their trade policies transparent by notifying the WTO about laws in force and measures adopted.”).

89. A Unique Contribution, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm.

90. *The WTO Can*, *supra* note 1 (“The WTO is mostly about hard law.”); *see also* Patrick Low, *Hard Law and Soft Law: Options for Fostering International Cooperation*, <http://e15initiative.org/wp-content/uploads/2015/09/E15-Services-Low-FINAL.pdf> (“The main body of the WTO Agreement sets out justiciable laws and procedures, and in this sense is an international legal contract.”).

91. A Unique Contribution, *supra* note 89 (“First stage: consultation (up to 60 days). Before taking any other actions the countries in dispute have to talk to each other to see if they can settle their differences by themselves. If that fails, they can also ask the WTO director-general to mediate or try to help in any other way.”)

92. Low, *supra* note 90 (“Intergovernmental contracts may encounter even more difficulty in this regard because political and commercial interests are blended and shape outcomes in ways that are less frequently encountered in private contracts.” Moreover, “even if the WTO dispute settlement system has justifiably earned a reputation for effectiveness, this is against a background where enforcement relies in no small part on state consent. Punishment mechanisms for non-compliance are largely limited to trade retaliation and the withdrawal of equivalent concessions. Retaliatory options are highly circumscribed in disputes between small and large countries because of the size disparity.”)

93. *Id.* (“justiciable hard law rests on fragile foundations because the law is international, not national. It applies among sovereignties. Enforcement mechanisms are circumscribed and rely heavily on state consent”).

94. *Id.*

95. Hoekman, *supra* note 5, (emphasis added); *see also* Ambassador Michael Punke, *supra* note 43.

96. Siegel, *supra* note 86, at 564, <https://www.imf.org/external/np/leg/sem/2002/cdmf1/eng/siegel.pdf>.

97. Hoekman, *supra* note 5.

and exchange of information, something on which there were and are concerns by developed countries and not just developing economies[.]” “activities of other government agencies at the border.”⁹⁸

Multilateral agreements are no longer about enforcement. Rather, multilateral agreements focus on parties volunteering. This follows studies in social behavior that volunteering participation is more effective than mandatory rules.⁹⁹ The current understanding of the TFA is that upon its implementation, “enforcement is left to the standard WTO mechanisms, including greater transparency for domestic consumers, the operation of the TFA Committee[.]”¹⁰⁰ However, “many of the provisions of the TFA are not self-enforcing” as it relies on the WTO’s DSU system.¹⁰¹ The United States formally heralded international agreements as a way of achieving the “greatest economic benefits offered by the global trading system[.]” but only if all trading partners are required to “abide by their commitments and play by agreed upon rules.”¹⁰²

Despite threats of protectionism from the current United States administration, it would be difficult for the United States to do so without violating certain obligations to its own people, not to mention its international obligations.¹⁰³ The United States’ Foreign Affairs Manual on Treaties and Other International Agreements states that to terminate an agreement to which the United States is a party:

Terminations of treaties or other international agreements are not to be undertaken, nor any exploratory discussions undertaken with representatives of another government or international organization, until authorized by the Secretary or an officer specifically authorized by the Secretary for that purpose.¹⁰⁴

Regarding termination of an international agreement, termination cannot unilaterally occur unless formal authorization is established for such termination, and all interested government agencies have the opportunity to express their opinion.¹⁰⁵ Moreover, there is no *definitive* determination on whether the President

98. *Id.*

99. June O’Keefe & Elina Villup, *The WTO Trade Facilitation Agreement: Reducing Bureaucracy at the Border* (EUROPEAN PARLIAMENT), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/549046/EXPO_BRI\(2015\)549046_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/549046/EXPO_BRI(2015)549046_EN.pdf).

100. Hoekman, *supra* note 5.

101. *Id.*

102. Ambassador Michael Punke, *supra* note 43.

103. Tucker, *supra* note 49 (For example, the current President of the United States could create higher tariffs on Chinese imports, but he would “almost assuredly face a challenge at the dispute settlement body if he tried to do so, as it is a blatant violation of most-favored nation rules. (For this reason, the policy would also probably be ineffective and likely lead to more imports from third countries.)”).

104. Foreign Affairs Manual, (CT:POL-44; 05-26-2006), 11 FAM 724.8, <https://fam.state.gov/search?query=withdrawal&category=FAM%5C11FAM&src=11%20FAM&filter=volumenum%7c11>.

105. *Id.* (A Circular 175 memorandum (as well as accompanying documents) should be prepared that takes into account the views of the relevant government agencies and interested bureaus within the

of the United States has such unilateral authority to terminate multilateral treaties and agreements.¹⁰⁶ The current administration, in theory, could “ask the U.S. Congress to repeal the TFA’s ratification and withdraw[.]” but this would be a deplorable action.¹⁰⁷ Some industries have already felt the crushing effects of the United States’ decision to remove itself from the TPP.¹⁰⁸ It is evident, at least from the excessive, needless financial losses the Texas agriculture industry is incurring, that withdrawing from such multilateral agreements serves to crush opportunities for United States wealth.¹⁰⁹

If the United States breaches its TFA obligations, WTO member nations may punish the United States through sanctions, as “the WTO is not so much a global government as it is a framework for structuring retaliation” or, in the alternative, disregard the United States as a global economic powerhouse entirely.¹¹⁰ Noncompliance or withdrawal from an IGO, however, is currently untested:

Members will remain bound, however, by conventions adopted by international organizations which they have separately ratified...like international treaties, binding decisions of international organizations seek to create rules of law—the continuing applicability of which may not be unilaterally denied. On the other hand, a legal obligation to comply with binding decisions may no longer be felt once the member has withdrawn. It will also be difficult for the organization to supervise compliance with such decisions. International sanctions will no longer be possible.”¹¹¹

It remains to be seen whether the United States will continue to “place an unprecedented emphasis on enforcement of existing trade agreements.”¹¹² Alternatively, an IGO’s scope and binding reach may become definitively determined to answer whether withdrawal from an IGO releases a former member

Department (including the Office of the Legal Adviser (L) and the Bureau of Legislative Affairs)).

106. David M. Ackerman, *Withdrawal from the ABM Treaty: Legal Considerations*, <http://congressionalresearch.com/RS21088/document.php?study=Withdrawal+from+the+ABM+Treaty+Legal+Considerations> (“Nonetheless, it remains the case that there has not been a final judicial determination of the constitutional parameters governing the termination of treaties.”).

107. Alejandro Reyes, *Force – and the U.S. is a Part of It*, TIME (Feb. 26, 2017), <http://time.com/4683483/trump-trade-facilitation-agreement/>.

108. Courtney Gilmore, *Trump’s Policy on Trade Costing Cattle Ranchers Thousands Each Day*, NBCDFW.ORG, <http://www.nbcdfw.com/news/business/Trumps-Policy-on-Trade-Costing-Cattle-Ranchers-Thousands-Each-Day-415319203.html> (Texas cattle, which “leads the nation with a total number of 248,800 farms and ranches, covering 130.2 million acres” are incurring a loss of over \$400,000.00 USD per day.).

109. *Id.*

110. Tucker, *supra* note 49.

111. Termination of Membership: Withdrawal: Withdrawal Based on Constitution in INTERNATIONAL ORGANIZATIONS OR INSTITUTIONS, MEMBERSHIP (Henry Schermers & Niels M. Blokker 2008), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e505> [hereinafter Termination of Membership].

112. Ambassador Michael Punke, *supra* note 43.

from prior binding decisions under that organization's rules.¹¹³

In sum, WTO members may find that the United States' involvement in international trade is unnecessary, which would make trade with the United States both irrelevant and expensive. Thus, while "[p]ulling out of the WTO should not be feared for any *necessary economic* fallout. The U.S. and world *could* get by just fine" but, the potential chain reaction in retaliation from WTO member nations and the WTO's DSU mechanism could cause it problems for international diplomacy.¹¹⁴ It is not possible to determine whether the WTO's DSU's will effectively address a breach under the TFA until and unless a dispute arises. But, the United States may be the first nation to discover whether the TFA has the teeth necessary to bring a WTO member into compliance. There may be cause for optimism as—to date—protectionism and populist governments are no match for international multilateral obligations.¹¹⁵

V. NON-PROTECTIONIST CRITIQUES OF THE MULTILATERAL TRADE AGREEMENTS

The widely-accepted theory is superbly elegant in its simplicity—trade is a conduit for peace.¹¹⁶ The thought behind this theory is that bilateral and multilateral trade limits the incentive for a state to instigate international conflict because of the dependence created between two or more nations for resources provided through such trade.¹¹⁷ However, a widely-accepted idea is not necessarily a fact.¹¹⁸ There are three major issues raised by economists, political scientists, and scholars around WTO agreements: (1) DSU enforcement; (2) whether globalized trade effectuates peace; and (3) whether WTO agreement benefits reach the developing and least developed nations as intended.

The first major issue with WTO agreements generally is regarding WTO DSU enforcement. There could be a lack of consensus on what a WTO enforcement means in practice, as the WTO DSU's appellate body appears to be more of a gap filler for instances negotiating governmental bodies lack the mechanisms to resolve disputes.¹¹⁹

The second is whether such multilateral agreements create peace. Economists, political scientists, and scholars have created formulas to test the theory that trade creates peace.¹²⁰ The results can seem counterintuitive to the standard 'trade equals

113. Termination of Membership, *supra* note 111; Ambassador Michael Punke, *supra* note 43.

114. Tucker, *supra* note 49.

115. *The WTO Can*, *supra* note 1 ("Trade rules...deter protectionism.").

116. Ju Hyun Pyun & Jong-Wha Lee, *Globalisation Promotes Peace*, VOX (Mar. 21, 2009), <http://voxeu.org/article/globalisation-promotes-peace>.

117. *Id.*

118. *Fact*, OXFORD ENGLISH DICTIONARY, <https://en.oxforddictionaries.com/definition/fact> ("A thing that is known or proved to be true.").

119. Tucker, *supra* note 49.

120. Emilie M. Hafner-Burton & Alexander H. Montgomery, *War, Trade, and Distrust: Why Trade Agreements Don't Always Keep the Peace*, 29 CONFLICT MGMT. & PEACE SCI. 257, http://pages.ucsd.edu/~ehafner/pdfs/Paper_Hafner-

peace' theory, depending on the variables used in the experiment:

While there are a group of states that fulfill the conditions for the liberal peace, for many states at the fringes, membership [in international trade institutions, like PTAs and the WTO]¹²¹ can actually increase conflict by defining hierarchies of access centrality and dependence that cause conflict with those at the bottom of those hierarchies.¹²²

Overall, however, the consensus is that there is less truth in a black-or-white theory of trade creating peace. Rather, bilateral and multilateral trade is likely to induce certain types of peace (i.e. stable political relations), while other types of conflict are negatively influenced by such agreements:

Trade globalization also affects the nature of war: Multilateral openness increases the probability of local wars but should deter global conflicts...Our model and empirical results also suggest that regional and bilateral trade agreements which foster regional and bilateral trade flows may have positive consequences for political relations. The positive political implications of these agreements may become even more important as multilateral trade flows increase.¹²³

One variable to consider is the effect of tariffs, that have historically crippled the positive aspects of global trade when left unchecked.¹²⁴ Bilateral and multilateral agreements preceding the TFA could not overcome tariffs even through free trade agreements, multilateral trade agreements, or bilateral treaties, as no formal multilateral agreement through the WTO existed until the TFA.¹²⁵

The third major problem with WTO agreements is that they may not necessarily reach certain least-developed nations that could potentially benefit from the agreements. Indigenous communities from all parts of the globe find the WTO's efforts do not protect indigenous peoples, who are largely recognized as some of the most impoverished groups in the world.¹²⁶ Groups like the Asia Indigenous Peoples Pact (AIPP) go so far as to claim the WTO violates the rights of indigenous peoples.¹²⁷ Indigenous criticism of the WTO stems from the indigenous peoples' desire to be formally domestically and internationally recognized as sovereign because "[u]ntil [indigenous persons'] right to self-

Burton_War%20Trade%20and%20Distrust_2012.pdf.

121. *Id.* at 273.

122. *Id.*; see also Philippe Martin, Thierry Mayer, & Mathias Thoenig, *Make Trade Not War?*, 75 REV. OF ECON. STUD. 865 (2008), <http://www.parisschoolofeconomics.eu/docs/koenig-pamina/martinmayerthoenig.pdf>.

123. Philippe Martin, Thierry Mayer, & Mathias Thoenig, *supra* note 122.

124. *World Trade, Tariffs, and War Debts*, CQ RESEARCHER (Oct. 5, 1932), <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1932100500>.

125. *WTO's Trade Facilitation Agreement enters into force*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/news_e/news17_e/fac_31jan17_e.htm (stating it was the first multilateral deal concluded in the 21-year history of the World Trade Organization).

126. Declaration: The World Trade Organization (WTO) and Indigenous Peoples: Resisting Globalization, Asserting Self-Determination, AIPPNET.ORG, <http://aippnet.org/declaration-the-world-trade-organization-wto-and-indigenous-peoples-resisting-globalization-asserting-self-determination/>.

127. *Id.*

determination is respected, genuine sustainable development will not be achieved.”¹²⁸ Thus, the TFA’s benefits may not reach a large population of least-developed economies within indigenous communities, which is problematic pursuant to its stated goals.

The problematic aspects of WTO agreements are legitimate concerns. However, it is difficult to imagine that a twenty-two-year-old mechanism will perfectly resolve the major issues that have always plagued peace and trade. WTO agreements like the TFA, while imperfect solutions, appear to largely benefit the WTO’s stated goals. Thus, the TFA’s benefits most realistically and pragmatically outweigh its more problematic aspects.

VI. CONCLUSION

Based on structures and hierarchies of international law, bilateral and regional agreements countries may create should “inform it and to spur [the TFA] on to action” rather than hinder continued bilateral and multilateral treaties between groups of nations.¹²⁹ It remains to be seen whether the United States’ engagement in the Global Alliance could be affected; however, it is likely if the United States determines to leave the WTO entirely, that there could be a hole left in the Global Alliance¹³⁰ that could severely hinder TFA implementation, at least, initially.

In conclusion, the TFA’s inherent structure and adoption that supersedes previous tariff structure could, perhaps, encourage a more peaceful and economically sound world.¹³¹ Whether the United States’ current administration chooses to continue to neglect its obligations under treaty law, withdraw from the WTO which it helped create and foster, or economically deplete its own people, the TFA will likely overcome such a setback and continue to be a beneficial mechanism for the world economy.¹³² While it could be a stretch to stipulate that the TFA will be a direct cause of world peace, it is reasonable to find that this pragmatic multilateral trade agreement will invariably benefit the global economy for those states that choose to adopt it. Thus, the global economy under the TFA’s guidance and structure should at least be a cause for optimism in an uncertain time for the world economy overall.

128. *Id.*

129. Ambassador Michael Punke, *supra* note 43.

130. *Id.* (stating “it is no exaggeration to say that the openness of the U.S. economy to goods and services is one of the most important sources of global economic stability” as of December 2016).

131. Tucker, *supra* note 49.

132. *Id.*

THE CHINA-PAKISTAN ECONOMIC CORRIDOR: REGIONAL EFFECTS AND RECOMMENDATIONS FOR SUSTAINABLE DEVELOPMENT AND TRADE

By: Shirin Lakhani*

In November 2003, China and Pakistan signed a Joint Declaration of Cooperation outlining their bilateral intent to promote trade and economic development.¹ In 2006, these nations composed and signed the Pakistan-China Free Trade Agreement (FTA) according to World Trade Organization (WTO) guidelines.² It was not until April 2015, when Chinese President Xi Jinping visited Pakistan, that the fruits of these agreements came to blossom. During this visit, China and Pakistan signed 51 agreements, memorandums of understanding (MoUs), and financing contracts, signaling the beginning of what is now known as the China-Pakistan Economic Corridor (CPEC).³

CPEC is a \$51 billion Chinese investment to develop Pakistan's infrastructure, transportation, and energy sectors.⁴ Approximately 80% of the projects are energy-related, with the remaining 20% dedicated to expanding existing infrastructure.⁵ The Corridor will link Kashgar to Gwadar, providing China with a direct route to the Persian Gulf. CPEC will reduce almost 13,000 km and forty-five days to ship goods to just 2,000 km and ten days (See Figure 1).⁶ In addition, secure energy sources, well-developed trade routes, and increased appeal to investors will bolster Pakistani textiles, agriculture, tourism, and manufacturing industries.

The potential for this investment to have a net positive impact on both China

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1. Joint Declaration Between the People's Republic of China and the Islamic Republic of Pakistan on Directions of Bilateral Cooperation, China-Pak., Nov. 04, 2003, http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t40148.shtml [hereinafter Joint Declaration].

2. Free Trade Agreement between the Government of the Islamic Republic of Pakistan and the Government of the People's Republic of China, China-Pak., Nov. 24, 2006, <http://wits.worldbank.org/gptad/pdf/archive/china-pakistan.pdf> [hereinafter FTA].

3. *List of Pakistan-China MoUs*, NATION (Apr. 21, 2015), <http://www.pcgov.org/april 23 2015.pdf> [hereinafter MoU List].

4. *CPEC worth \$51 bn after China, ADB approve new loans*, INVESTMENT GURU INDIA (Sept. 30, 2016), <http://www.investmentguruindia.com/economynews/cpec-worth-51-bn-after-china-adb-approve-new-loans>.

5. Azfer Naseem et al., *Impact of China Pak Economic Corridor - A Bird's Eye View* 1 (BMA Capital Management, May 19, 2015), http://investorguide360.com/wp-content/uploads/2015/05/Impact-of-China-Pak-Economic-Corridor_-A-Birds-Eye-View.pdf.

6. *Id.* at 3.

and Pakistan is great, however, CPEC is not without its problems. Security concerns, corruption, regional turmoil, and social and environmental impacts signal that there is ample work to be done. The most effective way to mitigate these risks is through an investment approach framed within the lens of long-term social, economic, and environmental sustainability. This Article aims to provide such a lens.

This Article is divided into two sections. The first section describes China's *One Belt, One Road* initiative and how CPEC fits into it. This section also includes an overview of the various CPEC projects and the bilateral agreements that govern the investment. The second section of this Article identifies key issues and roadblocks for CPEC. Recommendations on how to overcome these hurdles are divided into three categories: security, regional turmoil, and improved data analytics.

I. ONE BELT, ONE ROAD

Understanding the importance of CPEC requires a brief overview of China's larger *One Belt, One Road* (OBOR) initiative, perhaps best described as a modern-day Silk Road. OBOR is a network of pipelines, railways, roads, and maritime trade routes spanning across Asia, Africa, and Europe (See Figure 2).⁷ At the heart of OBOR is CPEC, with the entire system's crown jewel resting in Gwadar. The project is often seen as China's response to the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP).⁸ Neither of these global trade agreements includes China. The TPP is a partnership between the countries of North America and the Pacific Rim.⁹ Twelve countries in total compose the agreement, notably including China's closest neighbors, but not the red giant itself.¹⁰ The TTIP is a more western-focused agreement between the United States (US) and the European Union.¹¹ The TTIP is still undergoing negotiation, but the TPP utterly failed on US President Donald Trump's first day in office.¹² In contrast, both OBOR and CPEC are well underway. Only time will tell, however, if CPEC and OBOR are China's attempts to surpass the US as the world's superpower. What is certain in the interim is the magnitude of economic benefit that awaits both Pakistan and China at the end of their joint Corridor.

A. Infrastructure, Transportation, and Energy

CPEC is expected to add over 700,000 jobs to the Pakistani labor market and increase the country's GDP by 2.5 percentage points from 2015 to 2030, all through

7. Abhineet Singh, *Chinese Corridors And Their Economic, Political Implications For India*, SWARAJYA (June 7, 2016), <http://swarajyamag.com/world/chinese-corridors-and-their-economic-political-implications-for-india>.

8. *Id.*

9. Kevin Granville, *What is TPP? Behind the Trade Deal The Died*, NY TIMES (Jan. 23, 2017), https://www.nytimes.com/interactive/2016/business/tpp-explained-what-is-trans-pacific-partnership.html?_r=0.

10. *Id.*

11. TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP, OFFICE OF THE US TRADE REP., <https://ustr.gov/ttip>.

12. Granville, *supra* note 9.

a vast array of infrastructure, transportation, and energy projects.¹³ By March 2018, 14 of the 21 energy projects are estimated to produce 10,400 megawatts (MW) of energy.¹⁴ The projects include investments in both traditional and alternative energy sources, including solar, wind, coal, and hydropower. The infrastructure projects will expand on Pakistan's existing roadways to create a 1,100 km motorway between Lahore and Karachi; update the Karakorum Highway connecting Rawalpindi to China; upgrade the Karachi-Peshawar railway to handle a train running at 160 km/h; and extend a railway network to connect Pakistan to the Xinjiang Railway in Kashgar (See Figure 3).¹⁵ CPEC will also encompass a network of oil and natural gas pipelines, including one connecting Gwadar to Nawabshah in Iran.¹⁶

Gwadar is the connecting point for a substantial portion of CPEC activities. Its strategic prowess rests on its advantage as one of the world's largest deep-water ports, connecting South Asia, Central Asia, and the Middle East, and housing almost two-thirds of the world's oil reserves.¹⁷ The port's location at the mouth of the Persian Gulf makes it a prudent gateway for the first set of CPEC projects. Development projects should make Gwadar Port fully operational by the end of 2017. The remaining projects are expected to be operational by 2020.¹⁸

The Nation, a Pakistani news outlet, published a list of the 51 MoUs signed by Pakistan and China in April 2015.¹⁹ However, due to the lack of publicly available documentation for each agreement, this paper only provides contract titles. The actual financial structures of the various projects remain elusive. What we can discern is that most, if not all, of the energy-related projects are structured as public-private partnerships (P3s), with the government of Pakistan purchasing energy from private Chinese corporations funded by Chinese banks.²⁰ Access to power purchase agreements is limited, so it is difficult to ascertain the cost of each type of energy source. One particular power project between Sino-Sindh Resources and the Industrial and Commercial Bank of China is financed through a 75% debt, 25% equity deal.²¹ If one extrapolates this deal as a standard financing structure for other energy projects, which compose approximately 80% of the CPEC initiatives, one can estimate that 60% of CPEC will be funded through loans, and 40% through equity. Sinasure, a Chinese insurance corporation, will insure all of the loans. And

13. *How will CPEC boost Pakistan economy?*, DELOITTE, <https://www2.deloitte.com/content/dam/Deloitte/pk/Documents/risk/pak-china-eco-corridor-deloittepk-noexp.pdf> [hereinafter Deloitte Study].

14. *Id.*

15. Moonis Ahmar, *Strategic Meaning of the China-Pakistan Economic Corridor* 40 (UNIVERSITY OF KARACHI), http://issi.org.pk/wp-content/uploads/2015/12/Moonis-Ahmar_3435_SS_41_20142015.pdf.

16. Deloitte Study, *supra* note 13.

17. Saima Afzal, *Gwadar port versus Chahbhar port*, FOREIGN POLICY NEWS (May 25, 2015), <http://foreignpolicynews.org/2015/05/25/gwadar-port-versus-chahbhar-port/>.

18. Deloitte Study, *supra* note 13.

19. MoU List, *supra* note 3.

20. Engr Hussain Ahmad Siddiqui, *CPEC projects: status, cost and benefits*, DAWN (July 13, 2015), <http://www.dawn.com/news/1194014>.

21. *Id.*

the interest rates, in addition to Sinosure's 7% service fees, are no paltry sum.²² China can expect to reap an estimated 27% return on investment from most CPEC projects.²³

This debt burden creates a huge problem for Pakistan. While its banking sector is growing, the upfront capital costs of CPEC will likely make finding adequate local financing a significant challenge. However, the prospects of secure energy, massive reductions in trade barriers, and overall GDP growth should hopefully make Pakistan extremely attractive to foreign investors. This would be an excellent place for private equity firms from the US, Saudi Arabia, and even Iran or Russia to step in.

If Pakistan can renegotiate its infrastructure projects from debt-only deals into P3s, similar to its energy contracts with China, it can benefit from mitigated risk and reduced upfront costs. Alternately, Pakistan could subsidize its interest payments to China by strengthening its own micro-lending sectors. Interest collected from loans to local small and medium-sized enterprises (SMEs) can have the dual benefit of promoting local enterprise and paying off the high-interest loans accrued through CPEC. The downside to this option is the risk of non-payment. There are a few ways to mitigate default risk, including requiring the borrower to purchase insurance, requiring a guarantor with good credit, and even requiring the borrower to put up collateral (such as a house, another business, a car, etc.) according to credit risk.

Even with high upfront costs and long-term debt payments, CPEC can greatly benefit both Pakistan and China over the long term. To understand additional areas where the Sino-Pak relationship can be strengthened, we must understand the preceding agreements governing CPEC, specifically the Joint Declaration of Cooperation and the China-Pakistan Free Trade Agreement.

B. Joint Declaration of Cooperation

Chinese President Hu Jintao and Pakistani President Parvez Musharraf signed the China-Pakistan Joint Declaration on November 4, 2003.²⁴ It acknowledges the establishment of Sino-Pak relations in 1951 and the subsequent bilateral commitment to promote trade and cooperation between the two countries.²⁵ The Declaration establishes the China-Pakistan Joint Committee on Economic, Trade, Scientific and Technological Cooperation (JEC), and creates a goal for the establishment of a free trade agreement, which was ultimately achieved in 2006.²⁶ The Declaration is extremely wide in its coverage of industries to benefit from cooperation: technology, infrastructure, transportation, agriculture, forestry, fishery, SMEs, tourism, defense, culture, education, public health, sports, and media.²⁷ The countries also commit to mutual efforts to combat water and air pollution,

22. *Id.*

23. *Id.*

24. Joint Declaration, *supra* note 1.

25. *Id.*

26. *Id.* § 3.1.

27. *Id.* § 3.

unsustainable deforestation, extremism and terrorism, and organized transnational crimes.²⁸ Though aspirational and broad, the declaration notably does not overlook economic, social, and environmental concerns. And while seemingly unattainable, most, if not all, of the industries and goals touched upon in the declaration have been and will continue to be positively impacted by CPEC.

The next significant milestone in the Sino-Pak friendship was the China-Pakistan FTA.

C. *China-Pakistan FTA*

The 2006 FTA governs all subsequent trade between China and Pakistan, CPEC included.²⁹ The FTA strives to maintain consistency with the WTO's General Agreement on Tariffs and Trade (GATT), as noted in Article 1 of the FTA.³⁰ The most notable part of this agreement is its preamble. It clearly outlines the two countries' resolution to "promote reciprocal trade," while recognizing the importance of "promoting sustainable development in a manner consistent with environmental protection and conservation."³¹ The Tariff Elimination clause of Chapter 3, Article 8, section 1 is the primary manifestation of bilateral commitment to advantageous trade. It states that "...each Party shall progressively eliminate its import customs duties on goods originating in the territory of another Party..."³² Reducing cost barriers is a significant step towards promoting trade.

The FTA successfully balances favorable trade conditions with efforts towards sustainable development. The chapter on Sanitary and Phyto-sanitary Measures (SPS) most clearly manifests this balance.³³ This chapter recognizes the need to protect animal and plant life during trade; requires adherence to international standards and risk assessments; and establishes a Committee on Sanitary and Phytosanitary Matters to regulate compliance.³⁴ The SPS chapter demonstrates both China and Pakistan's commitment to balancing trade with sustainability. Limited evidence exists, however, as to whether such objectives are actually being achieved as trade proceeds under the FTA.

One particular criticism from which neither Pakistan nor China is immune is corruption. But the FTA will pleasantly surprise critics with the sheer number of transparency clauses composed specifically to combat this issue. Besides the entire chapter dedicated to transparency, the topic is integrated into two additional chapters, the SPS chapter discussed above and Chapter VII on Technical Barriers to Trade (TBT)³⁵ The transparency committed to in the FTA is, however, inter-party, meaning it is limited to promises made between China and Pakistan only.³⁶ For a

28. *Id.* § 5–6.

29. FTA, *supra* note 2, art. 6.

30. *Id.* art 1.

31. *Id.* at Preamble.

32. *Id.* art. 8.1.

33. *Id.* art. 28–34.

34. *Id.* art. 29, 33, 34.

35. *Id.* art. 32, 40, 42–5.

36. *Id.* art. 44.

more robust commitment to fighting corruption, both countries should henceforth include clauses for public transparency (in the form of news publications, publicly available project documents, commissioned studies, etc.) in addition to inter-party transparency.

The Extractive Industries Transparency Initiative (EITI) is one way many extractives companies and the countries in which they operate demonstrate their voluntary commitment to public accountability. The Initiative sets a governance standard for the public disclosure of transactions between companies and countries.³⁷ Countries that implement EITI standards for contract transparency are more likely to funnel profits into the country's economy than into the pockets of corrupt government officials because the country's "leaders can [now] be held accountable for their decisions."³⁸ Neither Pakistan nor China is among the list of EITI member countries. Voluntarily committing to EITI standards can encourage countries to extend transparency initiatives beyond extractives into the transportation, infrastructure, and energy sectors of both countries.

Although the China-Pakistan FTA has already been signed, the two countries can continue their efforts to combat corruption and increase transparency by including contract disclosure clauses in the agreements constituting CPEC. These clauses should require disclosure of all monetary transfers between the parties to the transaction, as well as how the parties agree to share risk and reward over the life of the project. China and Pakistan both committed to eradicate corruption in the recently signed MoU from November 9, 2016, but no specific or concrete measures as to *how* they plan on accomplishing this task exist.³⁹ Adding EITI-inspired clauses into existing and future CPEC agreements would be a very proactive and tangible demonstration of such commitment.

While not perfect, the FTA that governs CPEC agreements and investments is an excellent starting point. Beyond corruption, there are a few additional areas in which the agreement falls short. These issues include security, a balanced approach to regional turmoil, and adequacy of data analytics. Taking proactive steps to promote social and environmental sustainability will also add to the robustness of the parties' relationship. Such recommendations are provided below.

II. KEY ISSUES AND RECOMMENDATIONS FOR ECONOMIC, SOCIAL, AND ENVIRONMENTAL SUSTAINABILITY

Through analysis of CPEC's financial structure and governing trade agreements, this paper has already identified and provided solutions for two major roadblocks to the Corridor's success: corruption and high upfront capital requirements. The respective solutions fall within the framework of long-term sustainability. Integrating EITI-inspired contract disclosure clauses into existing and

37. *Who we are*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <https://eiti.org/about/who-we-are>.

38. *Fact Sheet*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, https://eiti.org/sites/default/files/documents/eiti_factsheet_en.pdf.

39. *China, Pakistan ink MoU to tackle corruption*, EXPRESS TRIBUNE (Nov. 9, 2016), <http://tribune.com.pk/story/1225067/china-pakistan-ink-mou-tackle-corruption>.

future agreements enhances governance and social license. Restructuring infrastructure projects into P3s and subsidizing CPEC interest payments through increased local micro-lending are measures benefiting economic and social sustainability.

Additional concerns that, if addressed, can significantly enhance CPEC's viability and net benefit to the communities and investors include security, regional turmoil, and the need for improved data analytics. Addressing these concerns within the investment agreements themselves can ensure compliance from the national to local levels of CPEC projects. The biggest concern with this type of integration is compliance. One way to ensure compliance is for China and Pakistan to publish a set of investment standards that include the solutions that follow. This method alleviates compliance risk by allowing the global public to play the role of regulatory watchdog. The first key issue and corresponding solutions is on the topic of security.

A. Security

A significant portion of CPEC projects take place in regions facing high levels of political unrest, terrorism, and economic volatility.⁴⁰ Security is a primary concern for both China and Pakistan. To alleviate some of these concerns, in April 2015, the Director General of Pakistan's Inter-Services Public Relations (ISPR) announced the creation of the "Special Security Division."⁴¹ The force consists of "nine army battalions and six wings of para-military forces in Rangers and Frontier Corps."⁴² The purpose of this Division will presumably be to provide security on and near CPEC construction zones to protect workers and property.

While physical military presence can alleviate threats and barriers to CPEC projects, a regional risk register may prove more useful. A risk register would allow the parties to evaluate existing political risks on a region-by-region basis, and respond accordingly with tailored solutions. The two countries could sign a MoU to establish a joint task force dedicated to formulating the political risk register, which should include the following regional analyses:

- Existing state of the regional economy;
- Presence, level, and frequency of terrorist activity;
- Level of social and political unrest;
- Local political risks (instances of corruption and/or bribery, etc.);
- Unemployment rates; and
- Any other pertinent analyses.

The joint task force should elicit the expertise of an unbiased third-party well-versed in risk analysis. IHS Markit (IHS) is one of many global risk consulting firms that could serve in this capacity.⁴³ IHS would be particularly useful in this context because of its depth of experience providing consulting services for oil and gas

40. Moonis Ahmar, *supra* note 15, at 44.

41. *Id.* at 45.

42. *Id.*

43. *Country Risk Consulting*, IHS MARKIT, <https://www.ihs.com/products/country-risk-consulting.html>.

companies. Collaboration with an organization like IHS can ensure the register remains objective and unbiased. Defining the problem first will ensure more effective solutions. Risks should be assessed and updated every three to five years. The information gathered from these risk analyses can help set local employment targets, determine the level of security forces necessary in each region, and map influential political leaders for more effective relationship-building, among other actions.

There are, however, several drawbacks to this proposed system. The most obvious would be the amount of time it would take to create a robust risk register system, especially now that CPEC projects are already underway. This time cost can be mitigated by first identifying which regions experience the greatest amount of CPEC activity, and concentrating efforts on those regions. Another potential fallout point for the risk register system is the sheer difficulty in quantifying intangible risk. But this is why the joint task force would benefit from professional consultation from a firm that already has methods of quantifying typically qualitative risks.

While a risk register is not without its faults, ultimately, the benefits outweigh the system's downfalls. First and foremost, having a robust analysis and tailored response to security concerns will ease investor anxiety and alleviate intra-regional turmoil. An effort to bolster security is not, however, a one-way street. Greater development in tumultuous regions of Pakistan, particularly Balochistan, where Gwadar port is located, can decrease unemployment and boost the local economy. Greater economic independence, a higher quality of life, and ensuring basic needs are met can decrease poverty and political unrest, and by extension, reduce the number of locals recruited to join terrorist groups.⁴⁴ This takes us to the next key issue faced by CPEC: regional turmoil.

B. Regional Turmoil

For many years now, the South Asian-Central Asian-Middle East region has been rife with fragile political relationships, military arms races, and power struggles. Because of its expansive reach and collaboration between two powerful partners, CPEC is an excellent opportunity for regional peace, development, and growth. If Pakistan and China allow neighboring countries to get involved in CPEC inter-regional turmoil can drastically reduce. Russia, Iran, Afghanistan, and other Central Asian countries can benefit from use of Gwadar Port and CPEC's many trade routes. Saudi Arabia, Russia, and the US can benefit by getting involved financially in some of CPEC's energy and infrastructure deals, as the projected return on investment is already over 20%.⁴⁵ Regional collaboration fits in well with China's OBOR initiative, enhances Pakistan's attractiveness to foreign investors, and aligns with both countries' recent expressions of welcome to Iran and Saudi Arabia.⁴⁶

Regional turmoil is not, however, limited to macro-level forces. Significant

44. Abhineet Singh, *supra* note 7.

45. Engr Hussain Ahmad Siddiqui, *supra* note 20.

46. *Pakistan to welcome Iran, Saudi Arabia on joining CPEC*, NEWS (Oct. 1, 2016), <https://www.thenews.com.pk/print/153917-Pakistan-to-welcome-IranSaudi-Arabia-on-joining-CPEC>.

intra-regional turmoil also exists within Pakistan's borders regarding CPEC.⁴⁷ The most vociferous disputes are regarding the placement of highways, motorways, and railways, and whether more transportation veins will traverse East Pakistan or West Pakistan.⁴⁸ It should come as no surprise that everyone wants a piece of the CPEC pie. Fear of population displacement, regional favoritism, and outsourced jobs also contribute to local discontent.⁴⁹ To fully understand and address these issues, CPEC agreements should integrate stakeholder mapping and engagement initiatives as mandatory contract clauses. Stakeholder maps can measure the contribution level, legitimacy, willingness to engage, influence, and necessity of involvement of individuals and groups affected by CPEC projects.⁵⁰ The maps can then inform strategies to mitigate social risk through a comprehensive stakeholder engagement plan (further discussed below).

Some additional ways Pakistan and China can alleviate social discontent is through workforce capacity development and establishment of local development funds tied to the profits generated from various CPEC projects. CPEC already includes investments in and partnerships between universities in both China and Pakistan.⁵¹ Additional investments in vocational training and scholarships to increase access to education will also prove beneficial. These initiatives will build local capacity, enhance quality of life through education, and empower low-income families to be more financially independent. Investments of this nature can be made through various local development funds. By tying revenues generated from energy projects to the development funds, and establishing decision-making bodies composed of local community members, stakeholders will feel empowered and more likely to perceive CPEC positively.

C. Improved Data Analytics

The key issues of security and regional turmoil can both benefit from more robust risk analyses. A regional risk register and stakeholder engagement plan should form part of a much larger impact assessment initiative. The dearth of detailed evidence regarding CPEC's social and environmental impacts indicates a need for a comprehensive impact assessment procedure. No evidence of an existing impact assessment process is currently available. Fortunately, there seems to be ample evidence of the economic impact CPEC can have on Pakistan.⁵² These economic projections can form the basis of these impact assessments. China and Pakistan should jointly commission a third-party organization to implement the following impact assessment plan:

47. Shamil Shams, *China's economic corridor creating new conflicts in Pakistan*, DW (Aug. 29, 2016), <http://www.dw.com/en/chinas-economic-corridor-creating-new-conflicts-in-pakistan/a-19510980>.

48. *Id.*

49. *Id.*

50. *Stakeholder Mapping*, BSR (Nov. 2011), https://www.bsr.org/reports/BSR_Stakeholder_Engagement_Stakeholder_Mapping.final.pdf.

51. MOU List, *supra* note 3.

52. Deloitte Study, *supra* note 13.

1. Create an input-output model⁵³ to measure direct, indirect, and induced economic impacts of CPEC on Pakistan at the national, regional, and local levels.
 - ❖ This model should include stakeholder income, spending, and perception studies.
2. Use results of stakeholder survey to identify and analyze areas of social concern, including stakeholder displacement, available rights and remedies, and local employment and procurement expectations.
3. Conduct an environmental impact assessment for all regions touched by CPEC projects, including analysis of affected plant and animal species, carbon emissions, affected waterways, and changes in air quality.
4. Use social impact assessment as basis for stakeholder engagement plan, which should include a communication plan, a complaint and grievance mechanism, and strategies to implement local employment and procurement targets.
5. Use environmental impact assessment as basis for environmental risk mitigation plan, which should include goals for reducing and/or compensating for impacts on land, species, air, and water.

Full inter-party and public disclosure of each step will ensure public satisfaction, government accountability, and investor assuagement.

III. CONCLUSION

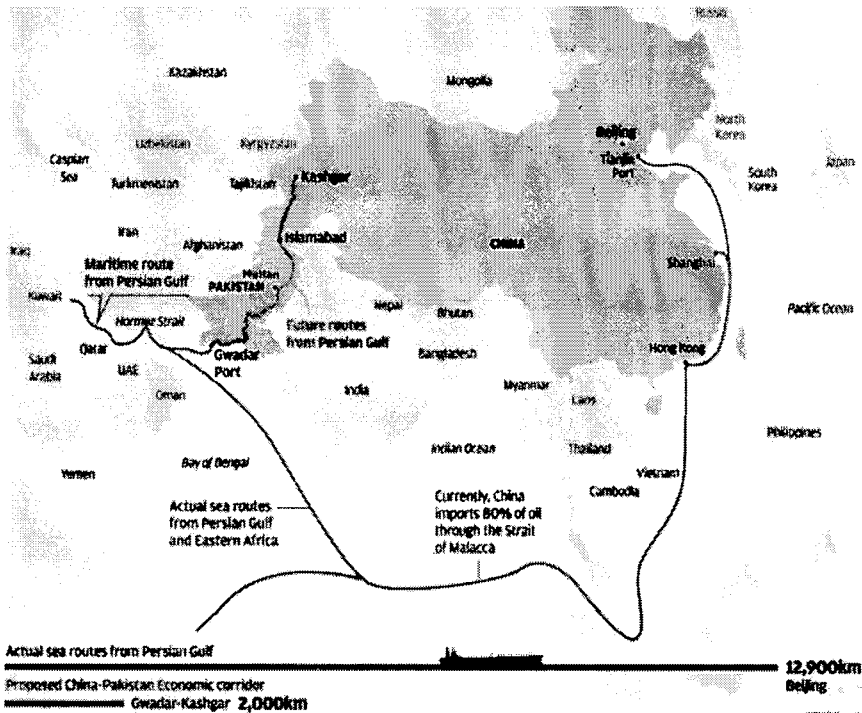
The China-Pakistan Economic Corridor will create a powerful network of trade routes and opportunities for sustainable development, benefitting China, Pakistan, and the surrounding region. The downside of such an extensive program is its potential for negative impacts through increased use of coal, increased road traffic, interruption of wildlife migration, and displacement of human populations. The existing Joint Declaration and FTA that govern CPEC agreements and investments do, however, provide a solid foundation for addressing key issues and potential roadblocks to CPEC's long-term success.

Ample room still exists for a more holistic approach to sustainability. Solutions include investments in local SMEs, establishing local development funds, implementing social and environmental impact assessments, creating a regional risk register, integrating EITI-inspired contract disclosure clauses, restructuring infrastructure agreements into P3s, and encouraging the involvement of neighboring countries. If even a few of these proposals are implemented into CPEC, Pakistan and China will benefit from mitigated social, political, and environmental risks, in addition to more sustainable economic development.

53. The input-output model was invented by Wassily Leontief, who also earned a Nobel Prize in Economics for it. The model has an inter-industry matrix that takes economic inputs from one industry and shows how those inputs affect other industries. The affects are "outputs." Inputs can include measures such as indirect/direct business taxes, dividends, capital expenditures, depreciation of assets, cost of labor, average household spending, etc. THIJIS TEN RAA, *INPUT-OUTPUT ECONOMICS: THEORY AND APPLICATIONS: FEATURING ASIAN ECONOMIES* (World Scientific, 2009).

Figure 1. Trade routes from Beijing to Persian Gulf.

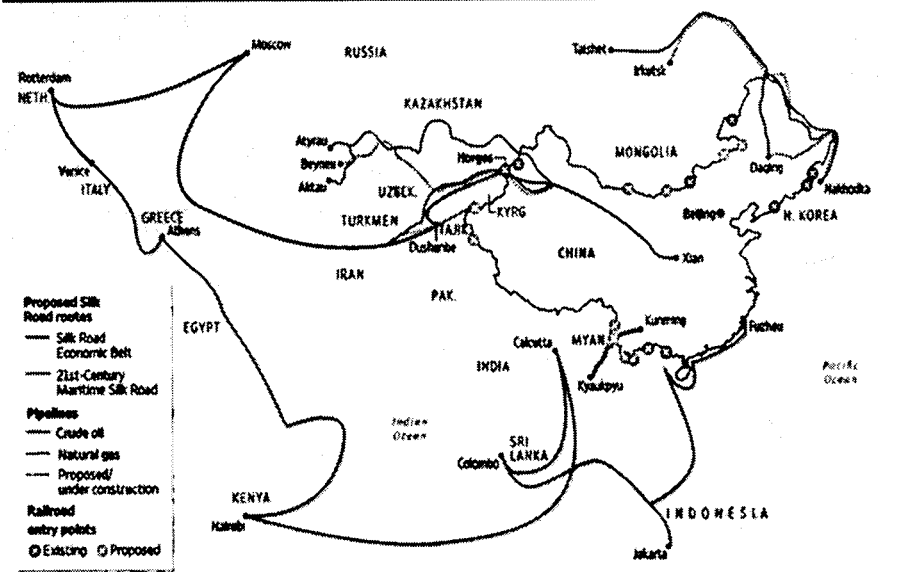
CPEC significantly shortens China's trade route to Middle East and Africa



Source: Media Sources, BMA Research

Figure 2. China's *One Belt, One Road* initiative.

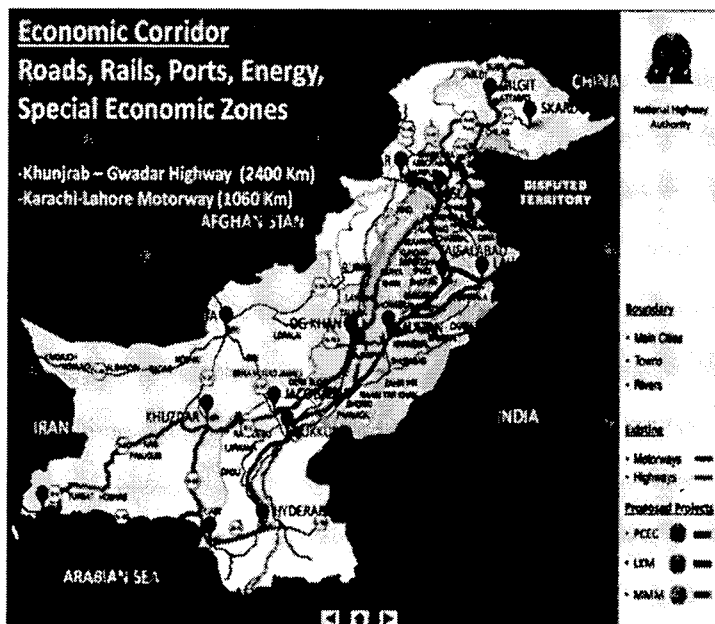
New Silk Roads | China is assembling new trade routes, binding other regions closer to it



Sources: Xinhua (Silk Road routes); U.S. Department of Defense, Geography, Transmittal (pipelines); United Nations (rail entry points)

Figure 3. Map of CPEC infrastructure and transportation projects.

Proposed Map of the China-Pakistan Economic Corridor



Source: <https://www.google.com/search?q=Maps+of+Pak-China+economic+corridor&ie=utf-8&oe=utf-8>

GLOBAL SUSTAINABLE FARMING AND THE “SoCo” SOIL CONSERVATION PROJECT

Shannon Avery Hughes*

I. INTRODUCTION

According to the United Nations, the world’s population reached 7 billion people in 2013.¹ According to their projections, the world’s population is expected to reach 9.6 billion people by 2050.² Of the many issues we are faced with as a planet, one principal concern is how we will feed an additional 2.6 billion humans by 2050. In addition to socio-economic, hunger, and poverty concerns, another issue brought about by the rise in population is how Earth’s agriculture can provide an adequate yield without creating further environmental degradation.

The International Assessment of Agricultural Knowledge, Science and Technology for Development (IAASTD) established one of the most rigorous and comprehensive assessments of agriculture to-date: *Agriculture at a Crossroads* (the Report).³ Co-sponsored by other leading organizations such as the World Bank and the Food and Agriculture Organization (FAO), this report concluded that, in order to address hunger and poverty, social inequities, and environmental sustainability, a radical change was needed in agricultural policy and practice.⁴ The Report indicated that because modern industrial farming uses enormous amounts of water, fertilizer, and energy, it causes collateral damage to the environment.⁵ This damage ripples, increasing land loss, habitat loss, climate change due to greenhouse gas emissions, soil erosion from monoculture (the intensive and continual farming of one type of crop on a plot of land), toxic run-off into drinking water, and increased chemical pesticide use.⁶

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1. Dep’t of Econ. & Soc. Affairs, Population Div., *World Population Prospects: The 2012 Revision, Volume I: Comprehensive Tables*, U.N. Doc. ST/ESA/SER.A/336, at 1 (2013).

2. *Id.*

3. INT’L ASSESSMENT OF AGRIC. KNOWLEDGE, SCI. & TECH. FOR DEV., *AGRICULTURE AT A CROSSROAD: GLOBAL REPORT* (Beverly D. McIntyre, et al. eds., 2009) [hereinafter IAASTD, the Report].

4. *Id.* at 118.

5. *Id.* at 146.

6. *Id.* at 35, 329; FRED MAGDOFF & BRIAN TOKAR, *AGRICULTURE AND FOOD IN CRISIS: CONFLICT, RESISTANCE, AND RENEWAL* 125, 283–284 (Monthly Rev. Press 2010) (referencing the University of Minnesota study concerning the environmental damage of farming and noting current agriculture practices are harmful to the environment); DALE ALLEN PFEIFFER, *EATING FOSSIL FUELS: OIL, FOOD AND THE COMING CRISIS IN AGRICULTURE* 12–13 (B.C. Gabriola ed., 2006); João Carlos da

Agricultural production techniques most recently placed a significant emphasis on high production. Farmers industrialized their trade, in order to feed as many people as possible which decreased levels of starvation around the world.⁷ However, the pursuit of high production took a tremendous toll on the environment. In the long-run, industrialized farming techniques wreaked havoc on air and water quality, negatively impacting nearby farming communities. Air and water pollution are just a glimpse into the issues that communities must shoulder as a result of high-yield farming, and unfortunately these issues generally fall on the shoulders of the most vulnerable, the global poor.⁸ Negative externalities from industrial farming also contributes to poverty, drought, and, ironically, hunger in many underprivileged communities.⁹ As resource scarcity conditions worsen, it can also create an atmosphere in which political unrest can unfold – causing increased global food prices, and even violence if left unchecked.¹⁰ It is therefore imperative that efficient yet sustainable farming becomes a high-priority in discourse related to the environment, global planning, and human rights.

The backbone of agricultural efficiency and production is soil quality. Without nutrient-rich soil, resulting crops are fewer and less healthy. Modern farming practices have caused soil degradation to become a chief concern among the agricultural community.¹¹ Soil degradation is often accelerated by human activities, such as improper soil use and cultivation practices.¹² A recent sustainable agriculture project entitled the “Sustainable Agriculture and Soil Conservation through Simplified Cultivation Techniques” (the SoCo Project) focused on solving soil degradation issues in the European Union and can be used as a model for how soil health can be evaluated and managed.¹³ The program used initial research; formal discussions between communities, stakeholders, and

Silva Dias, *Biodiversity and Plant Breeding as Tools for Harmony Between Modern Agriculture Production and the Environment*, in MOLECULAR APPROACHES TO GENETIC DIVERSITY 1, 11 (Mahumut Caliskan et al. eds., 2015); Kumi Naidoo, *The Food System We Choose Affects Biodiversity: Do We Want Monocultures?*, GUARDIAN (May 22, 2014), <https://www.theguardian.com/sustainable-business/food-system-monocultures-gm-un-diversity-day>.

7. IAASTD, the Report, *supra* note 3, at 117; John Ikerd, *The Inevitable Economic, Ecological, and Social Consequences of CAFOs* 12 (Mar. 4, 2013), <http://web.missouri.edu/ikerdj/papers/WalesInevitableConsequencesofCAFOs.pdf>.

8. Daniel Maxwell, *Food Security and Political Stability: A Humanitarian Perspective*, in FOOD SECURITY & SOCIOPOLITICAL STABILITY 279, 280 (Christopher B. Barrett ed., 2013); Ikerd, *supra* note 7, at 8–9, 12; John Ikred, *Impacts of CAFOs on Rural Communities* 1–2 (July 26, 2008), <http://web.missouri.edu/ikerdj/papers/IndianaCAFOsCommunities.pdf>.

9. IAASTD, the Report, *supra* note 3, at 146.

10. Daniel Maxwell, *supra* note 8, at 280; John Ikerd, *supra* note 7, at 8–9, 12; Ikred, *supra* note 8, 1–2; IAASTD, the Report, *supra* note 3, at 269.

11. Martha M. Bakker et al., *The Effect of Soil Erosion on Europe's Crop Yields*, 10 ECOSYSTEMS 1209, 1217 (2007).

12. *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Toward a Thematic Strategy for Soil Protection*, at 9–10, COM (2002) 179 (Apr. 16, 2002).

13. *Final Report on the Project 'Sustainable Agriculture and Soil Conservation (SoCo)'*, at 1, EUR 23820 EN (2009) [hereinafter *SoCo Project*].

researchers; and a variety of organic and conservation farming techniques to ultimately increase short-term productivity while maintaining the integrity of the soil for long-term production.¹⁴ From this project, we understand that utilizing certain farming practices can better protect soil and result in healthier crops and less environmental degradation.¹⁵

The SoCo Project's main success was proving that the modern industrialized farming techniques that developed countries had hung their hats on, were not the *only* way to increase production. Rather, this study proved that where more sustainable practices were implemented, more long-term productivity and less negative externalities would result.¹⁶

This Article highlights the precedence and growth of modern agriculture under the Green Revolution, an era coined as such after the growth of agricultural modernization in the 1940's. The Green Revolution promoted increased uses of pesticides, synthetic nitrogen fertilizers, monoculture techniques, and genetically-engineered crops and ultimately increased productivity in the short term.¹⁷ The Green Revolution was born out of scientific ingenuity and the desperation of a looming global famine.¹⁸ During this time, scientists discovered ways to breed hardier grains and used improved technology to produce more crops, faster.¹⁹ Because of the new practices encouraged by the Green Revolution, thousands of people were able to avoid famine.²⁰ Overall, the Green Revolution was a major success because it allowed for an unprecedented level of national food security, leading to a human population boom; it could be said that it aided in producing the 7 billion people on the planet today.²¹ While the Green Revolution initially had a positive impact, the revolution brought about great problematic environmental consequences globally resulting in poverty and economic instability.²²

Additionally, this Article will focus on the SoCo Project as a successful sustainable agriculture project, and an answer to the problems developed under modern farming. This Article will highlight the SoCo Project's implementation, strategy, challenges, and conclusions. Finally, this Article concludes that the SoCo Project should stand as a model for the obstacles and successes involved in the implementation of sustainable agriculture projects.

14. *Id.* at 17.

15. Sustainable Agriculture and Soil Conservation (SoCo), *Fact Sheet 1: Linking Soil Degradation Processes, Soil-Friendly Farming Practices and Soil-Relevant Policy Measures 2* (May 2009), <https://esdac.jrc.ec.europa.eu/projects/SOCO/FactSheets/ENFactSheet-01.pdf>.

16. *SoCo Project*, *supra* note 13, at 137.

17. U.N. DEP'T OF ECON. & SOC. AFFAIRS, WORLD ECONOMIC AND SOCIAL SURVEY 2011: THE GREAT GREEN TECHNOLOGICAL TRANSFORMATION, at 79, 88, U.N. Doc. ST/ESA/333, U.N. Sales No. E.11.C.1 (2011) [hereinafter *WORLD ECONOMIC & SOCIAL SURVEY*].

18. Prabhu L. Pingali, *Green Revolution: Impacts, Limits, and the Path Ahead*, 109 *PROC. NAT'L ACADE. SCI.* 12302, 12302 (2012) [hereinafter *Pingali*].

19. *Id.*; *WORLD ECONOMIC AND SOCIAL SURVEY*, *supra* note 17, at 88.

20. *Pingali*, *supra* note 18, at 12302.

21. *Id.*; PETER B. R. HAZELL, *GREEN REVOLUTION: CURSE OR BLESSING?* 4 (*Int'l Food Pol'y Res. Inst.*, 2002).

22. *Pingali*, *supra* note 18, at 12303–04.

II. PRACTICES IN MODERN AGRICULTURE AND THEIR EFFECTS ON SOIL HEALTH

A. *The Green Revolution*

In the 1940's, when famine was looming in Mexico, Norman Borlaug, an American scientist working in Mexico, developed a disease-resistant, high-yield varietal of wheat to prevent further starvation in the country.²³ The hardier new wheat, along with the implementation of different farming techniques, allowed Mexico to produce more wheat than it had ever before.²⁴ This was a massive transformation, as Mexico had been importing *half* of its wheat just years before.²⁵ Borlaug used a method called "shuttle breeding," which created greater imperviousness in crops.²⁶ He also developed strains of crops that could be grown in various climates.²⁷

Because of Norman Borlaug's success in Mexico, these new farming techniques and hardier crop varieties spread globally and the Green Revolution was born.²⁸ Borlaug then tackled starvation faced by both India and Pakistan after his success in Mexico.²⁹ After the implementation of Borlaug's techniques, Pakistan and India were not only able to meet the demand of the rising population, but exceed it, producing more crops than ever before.³⁰

Borlaug later won the Nobel Peace Prize for his contribution to industrialized agriculture and is credited with saving millions of people from starvation.³¹

Since the Green Revolution, between 1950 and 1992, global crop production has increased by over 150%.³² Between 1950 and 2000, world production of grain nearly tripled.³³ Grain production rose by 140% in Africa, by almost 200% in Latin

23. *Dr. Borlaug: Biography*, NORMAN E. BORLAUG: LEADERSHIP ENHANCEMENT IN AGRIC. PROGRAM, <http://borlaugleap.org/dr-borlaug> (last visited Feb. 27, 2017) [hereinafter *Dr. Borlaug: Biography*].

24. Salil Singh, *Norman Borlaug: A Billion Lives Saved*, AGBIOWORLD, <http://www.agbioworld.org/biotech-info/topics/borlaug/special.html> (last updated 2011).

25. Amanda Briney, *Green Revolution: History and Overview of the Green Revolution*, THOUGHTCO (Mar. 3, 2017), <https://www.thoughtco.com/green-revolution-overview-1434948>.

26. Gregg Easterbrook, *Forgotten Benefactor of Humanity*, ATLANTIC (Jan. 1997), at 5, <https://www.theatlantic.com/magazine/archive/1997/01/forgotten-benefactor-of-humanity/306101/> [hereinafter Easterbrook].

27. *Id.*

28. *Dr. Borlaug: Biography*, *supra* note 23, at 1–2.

29. Easterbrook, *supra* note 26.

30. *Id.*

31. *Id.* ("Perhaps more than anyone else, Borlaug is responsible for the fact that throughout the postwar era, except in sub-Saharan Africa, global food production has expanded faster than the human population, averting the mass starvations that were widely predicted – for example, in the 1967 best seller *Famine – 1975!* The form of agriculture that Borlaug preaches may have prevented a billion deaths.").

32. Henry Miller, *Norman Borlaug: The Genius Behind the Green Revolution*, FORBES (Jan. 18, 2012, 11:56AM), <https://www.forbes.com/sites/henrymiller/2012/01/18/norman-borlaug-the-genius-behind-the-green-revolution/#5dc45ae56a43>.

33. Food and Agric. Org. [FAO], *The State of the World's Land and Water Resources for Food*

America, and by 280% in Asia.³⁴ Because of the increase in crop production, the human population has skyrocketed, owing its growth, in part, to the Green Revolution and Norman Borlaug.³⁵ Now we are faced with a similar crisis, in which we must craft a solution to feed billions of people, and correct the problems caused by the Green Revolution.

B. *Modern Agriculture's Impact on Soil*

The most important part of any agricultural system is the soil.³⁶ When the soil is poor, it cannot sustain a productive agriculture. Many agricultural systems are at risk and unproductive because "soils have been damaged, eroded, or simply ignored during the process of modern agricultural intensification."³⁷

The Green Revolution's use of monoculture (also called mono-cropping), or planting the same type of crops repeatedly, has caused a lack of fertility in the soil.³⁸ Individual crops use particular nutrients and when harvested, the nutrients are removed from the soil, leaving it depleted.³⁹ Before the Green Revolution, farmers "fallowed" their fields, leaving them barren, for short periods of time.⁴⁰ Alternatively, farmers have historically alternated between different crops in order to maintain robust nutrient levels.⁴¹ By fallowing and rotating fields, pre-Green Revolution farmers allowed the soil to rest and regain nutrients necessary for abundant and healthy crops.

While monoculture produces crops at a very efficient rate, it is harmful to the soil in the long-term. Because of the lack of diversity, crops become fragile and more dependent on fertilizers and pesticide use.⁴² In 2009, scientists at the University of Illinois found that loss of organic matter depletes soil's ability to store nitrogen, and causes the soil to become dependent on chemical fertilizers.⁴³

and Agriculture: Managing Systems at Risk xxiv (2011), <http://www.fao.org/docrep/017/i1688e/i1688e.pdf>.

34. *Id.*

35. *Whitepaper: Growing for Our Future*, AGRICEN & AGRICEN SCIENCES, <http://www.agricensciences.com>.

36. Alexandra Bot & José Benites, *The Importance of Soil Organic Matter*, 80 SOILS BULL. OF FOOD & AGRIC. ORG. 51 (2005), <http://www.fao.org/docrep/009/a0100e/a0100e.pdf>.

37. JULES PRETTY & RACHEL HINE, CENTRE FOR ENVIRONMENT & SOCIETY, UNIVERSITY OF ESSEX, REDUCING FOOD POVERTY WITH SUSTAINABLE AGRICULTURE: A SUMMARY OF NEW EVIDENCE 17 (Feb. 2001).

38. Katherine Killebrew & Hendrik Wolff, *Environmental Impacts of Agricultural Technologies EPAR Brief No. 65* 3 (Evans Sch. Pol'y Analysis & Res., Mar. 17, 2010), https://evans.uw.edu/sites/default/files/Evans%20UW_Request%2065_Enviro%20Impacts%20of%20Ag%20Technologies_03-17-2010_0.pdf.

39. Bot & Benites, *supra* note 36, at 71.

40. *Id.*

41. Why is Crop Rotation Important?, WONDEROPOLIS, <http://wonderopolis.org/wonder/why-is-crop-rotation-important>.

42. Plant Production and Protection Division: Agriculture and Soil Biodiversity, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, <http://www.fao.org/agriculture/crops/thematic-sitemap/theme/spi/soil-biodiversity/agriculture-and-soil-biodiversity/en/>.

43. R. Mulvaney, S. Khan, T. Ellsworth, *Synthetic Nitrogen Fertilizers Deplete Soil Nitrogen: A*

The researchers noted that such evidence is common in scientific literature but has seldom been acknowledged because synthetic nitrogen fertilizer practices have been predicated largely on short-term economic gain rather than long-term sustainability.⁴⁴

Thus, an analysis which includes the importance of soil nutrition, and not merely economic gain, must be conducted in order to implement a sustainable agricultural system.

III. FOOD SECURITY AND ITS ROLE IN INTERNATIONAL CONFLICT

Alarming predictions have been made about the potential for climate change to fuel war and other forms of violent conflict.⁴⁵ At the extreme end, it has been suggested that the uncontrolled effects of climate change could generate conflicts on the same intensity scale of the world wars and last for centuries.⁴⁶ A study suggests that forty-six countries, totaling 2.7 billion people, are at high risk for violent conflict in the immediate future due to climate change exacerbating underlying causes of conflict.⁴⁷ Moreover, a further fifty-six countries, totaling 1.2 billion people, are at high risk of political instability, possibly leading to violent conflict in the longer term.⁴⁸

In 2007, UN Secretary-General Ban Ki-moon warned that the increased flooding and droughts could harm those already marginalized communities, stating, "The consequences for humanity are grave. Water scarcity threatens economic and social gains and is a potent fuel for wars and armed conflict."⁴⁹ Thus, as we engage in public discourse on topics of peace, climate change and its impacts on resource scarcity must have a seat at the table.

The role of climate change and its effects on water are vital to soil health and crop production. Over the past three decades, the area of land under irrigation has expanded, increasing the heavy use of water input to cropland.⁵⁰ Agriculture accounts for sixty-nine percent of water globally withdrawn from rivers, lakes and aquifers, and up to ninety percent in some developing countries.⁵¹ As a result of climate change, crop yields may decline by as much as thirty percent.⁵²

Global Dilemma for Sustainable Cereal Production, 38 J. ENVTL. QUAL. 2308 (Nov. -Dec. 2009).

44. *Id.*

45. John Podesta & Peter Odgen, *The Security Implications of Climate Change*, 31 WASH. Q. 115, 116 (2007-08).

46. *Summary*, 69 1, 2 (Whitehall Papers 2007), <http://www.tandfonline.com/doi/abs/10.1080/02681300802012886>.

47. DAN SMITH & JANANI VIVEKANANDA, *A CLIMATE OF CONFLICT: THE LINKS BETWEEN CLIMATE CHANGE, PEACE AND WAR* 3 (Nov. 2007).

48. *Id.*

49. *Id.*

50. Food and Agric. Org. [FAO], *Summary Report: World Agriculture toward 2015/2030* 44 (2002), <http://www.fao.org/3/a-y3557e.pdf>.

51. Don Hinrichsen & Henrylito D. Tacio, *The Coming Freshwater Crisis is Already Here*, in *FINDING THE SOURCE: THE LINKAGES BETWEEN POPULATION AND WATER* 1, 5 (2002).

52. David Pimentel, *Climate Changes and Food Supply*, CIESIN, <http://www.ciesin.org/docs/004-138/004-138.html>.

When the soil, the very foundation of the global breadbasket, is used beyond its capacity, human suffering and starvation is inevitable.⁵³ In his 1970 Nobel Peace Prize Speech, Norman Borlaug stated:

Perhaps no one in recent time has more pungently expressed the interrelationship of food and peace than Nobel Laureate Lord John Boyd Orr, the great crusader against hunger and the first director general of the Food and Agricultural Organization, with his famous words, "You can't build peace on empty stomachs." These simple words of wisdom, spoken twenty-one years ago, are as valid today as when they were spoken. They will become even more meaningful in the future, as world population skyrockets and as crowding, social pressures and stress increase. To ignore Lord Orr's admonitions would result in worldwide disorders and social chaos, for it is a fundamental biological law that when the life of living organisms is threatened by shortages of food they tend to swarm and use violence to obtain their means of sustenance.⁵⁴

Poor crop production, coupled with climate change symptoms like drought, have historically caused starvation and conflicts among those jockeying for precious resources.⁵⁵ For example, scholars have cited climate change, poor crop production, and food prices were huge contributors to the period of violence in the Middle East known as the "Arab Spring", in 2011.⁵⁶ A year prior, food prices increased in Russia, Ukraine, China, Argentina, Canada, Australia, and Brazil due to droughts and torrential storms, which diminished global crops.⁵⁷ Because of these factors, countries that were already experiencing political unrest were pushed further to violence. The region was experiencing internal sociopolitical, economic, and climatic frictions, researchers concluded the resulting food crisis drove tensions over the edge.⁵⁸

Regardless of the speed at which the climate warms, only wealthy countries have the infrastructure and social safety nets to effectively handle the crises.⁵⁹ Less wealthy countries may see a faster increase in food shortage and a greater need for

53. See generally PETER SCHWARTZ & DOUG RANDALL, AN ABRUPT CLIMATE CHANGE SCENARIO AND ITS IMPLICATIONS FOR THE UNITED STATES NATIONAL SECURITY (U.S. Dept. of Def. eds., 2003); COURTNEY WHITE, GRASS, SOIL, HOPE: A JOURNEY THROUGH CARBON COUNTRY 28, 29, 71 (2014).

54. Norman Borlaug, The Green Revolution: Peace and Humanity, 1970 Nobel Lecture in Oslo, Norway (Dec. 11, 1970), http://www.nobelprize.org/nobel_prizes/peace/laureates/1970/borlaug-lecture.html.

55. Henk-Jan Brinkman & Cullen S. Hendrix, *Food Insecurity and Violent Conflict: Causes, Consequences, and Addressing the Challenges* 7 (Occasional Paper No. 24 of the World Food Programme, July 2011).

56. *Id.*

57. Ines Perez, *Climate Change and Rising Food Prices Heightened Arab Spring*, SCIENTIFIC AMERICAN (Mar. 4, 2013), <https://www.scientificamerican.com/article/climate-change-and-rising-food-prices-heightened-arab-spring/>.

58. *Id.*

59. Marie L. Miranda et al., *The Environmental Justice Dimensions of Climate Change*, 4 ENVTL. JUST. 17, 21 (2011).

food security, making more efficient farming techniques all the more urgent.⁶⁰ It is more important than ever to protect the quality of soil in order to prevent resource-scarcity conflicts and humanitarian disasters.

IV. SUSTAINABLE FARMING PRACTICES: IMPACTS ON SOIL HEALTH

Current understanding maintains that "agriculture is sustainable when current and future food demands can be met without unnecessarily compromising economic, ecological, and socio-political needs."⁶¹ Ideally, sustainable farming practices will benefit three major objectives: economic stability, environmental sustainability, and social sustainability.⁶²

The University of Essex recently completed the largest-ever survey of sustainable agriculture initiatives in developing countries, covering more than 200 projects in fifty-two countries.⁶³ Researchers found improvements in food production occurring through one or more of four mechanisms: (1) intensification of a single component of a farm system, (2) addition of a new productive element to a farm system, (3) better use of water and land, and (4) improvements in yields of crop staples (such as grains) through introduction of new locally appropriate crop varieties and animal breeds.⁶⁴

The study found that sustainable agriculture practices led to an average increase of ninety-three percent in per hectare food production, without increasing environmental degradation.⁶⁵ This increase in production flies in the face of modern agriculture, proving that sustainable agriculture can also be, literally, fruitful.

The majority of sustainable agriculture projects attempt to reduce soil erosion and make improvements to the physical structure of soil.⁶⁶ Projects strive to balance water holding capacity and nutrients through the adoption of organic farming and conservation measures.⁶⁷ Some examples of the practices employed to meet these ends are: use of cover crops, crop rotation, use of compost, adoption of zero-tillage, and use of organic fertilizers.⁶⁸ The following is a discussion of how many of these sustainable practices were put to use on the ground, in a study entitled, the "SoCo Project".

V. SOIL CONSERVATION PROJECT CASE STUDY: THE SOCo PROJECT

Soil erosion in Europe has been a major concern for European policy-makers

60. *Id.* at 18.

61. Agnieszka Latawiec & Jolanta B. Królczyk, *Sustainability Indicators for Agriculture in the European Union*, in SUSTAINABILITY INDICATORS IN PRACTICE 182, 184 (2015).

62. *Id.* at 184–85.

63. J.N. Pretty et al., *Reducing Food Poverty by Increasing Agricultural Sustainability in Developing Countries*, 95 AGRIC., ECOSYSTEMS & ENV'T 217, 220–221 (2003).

64. *Id.* at 220–21.

65. *Id.* at 223.

66. *SoCo Project*, *supra* note 13, at 37.

67. *Id.* at 19.

68. *Id.* at 37, 89.

and farmers alike.⁶⁹ Erosion can result in productivity losses and cause contamination to local water sources.⁷⁰ To correct further erosion, European Parliament requested the European Commission carry out the SoCo Project to determine how best to implement more sustainable practices.⁷¹ The project was a joint collaboration between the Directorate-General for Agriculture and Rural Development and the Joint Research Centre.⁷²

The SoCo Project focused narrowly on soil because of its impact on agriculture as a whole. In order to make recommendations to stakeholders, the SoCo Project investigated how local communities could tailor their farming techniques to increase soil quality and how policies could be adapted to ensure proper implementation.⁷³ In carrying out this project, the European Parliament reasoned that policy makers may decide to support particular farming practices discovered through this project, or implement new relevant policies.⁷⁴ The Project faced obstacles in its implementation, however, this was mainly due to lack of resources to enable long-term implementation; farmers were concerned about income loss and expenses of new equipment.⁷⁵ Despite some challenges, the Project was successful in established a baseline of understanding of how, where, and when to implement sustainable farming practices to benefit the health of the soil.

A. Soil-Focus Impacts Agriculture from the Ground Up.

Throughout history, farming has contributed to creating and maintaining a rich variety of landscapes and habitats. However, agricultural practices have also had a myriad of adverse environmental effects. As a result of inappropriate agricultural practices, farming has caused: degradation of soil, pollution, water contamination, decreased air quality, fragmentation of habitats, and loss of wildlife.⁷⁶ The care of soil results in better food production, which in turn contributes to poverty reduction and social maladies related to hunger and malnutrition.⁷⁷

To further clarify, soil is subject to a series of degradation processes linked to agriculture such as: erosion due to water, wind, and tillage; compaction; declining organic carbon and biodiversity; salinization; and contamination by heavy metals

69. *Id.* at 5.

70. *FactSheet: Soil Erosion – Causes and Effects*, ONTARIO MINISTRY OF AGRIC., FOOD, & RURAL AFFAIRS, <http://www.omafr.gov.on.ca/english/engineer/facts/12-053.htm>.

71. *SoCo Project*, *supra* note 13, at 17.

72. *Id.*

73. *Id.* at 141.

74. *Id.* at 96–98.

75. *Id.* at 112.

76. *FactSheet No 1: Linking Soil Degradation Processes, Soil Friendly Farming Practices and Soil-Relevant Policy Measures* (Sustainable Agric. & Soil Conservation) <http://esdac.jrc.ec.europa.eu/projects/SOCO/FactSheets/EN%20Fact%20Sheet.pdf>.

77. JULES PRETTY & RACHEL HINE, *REDUCING FOOD POVERTY WITH SUSTAINABLE AGRICULTURE: A SUMMARY OF NEW EVIDENCE* 9 (Univ. of Essex, Feb. 2001).

and pesticides, or excess nitrates and phosphates.⁷⁸ Additionally, the major drivers for erosion are intense rainfall, topography, low organic matter content, percentage and type of vegetation cover, inappropriate farming practices, and land marginalization or abandonment.⁷⁹ The area with the highest wind erosion risk is found across areas with looser soil, such as sandy regions, and coastlines.⁸⁰

B. Objectives of the SoCo Project

The three main objectives of the SoCo Project were: (i) to improve the understanding of soil conservation practices; (ii) to analyze how farmers can be encouraged to adopt soil conservation practices; and (iii) to make this information available to relevant stakeholders and policy makers in the European Union.⁸¹

C. Implementation and Practices

The SoCo Project relied heavily on research and a “measure twice, cut once” methodology.⁸² A series of questionnaires were designed for experts, farmers, and government officials involved in soil conservation.⁸³ The questionnaires assessed risks of policies and agricultural measures.⁸⁴ Interviews were carried out to improve the understanding of soil conservation practices, to analyze how farmers could be encourage to adopt sustainable practices through policies, which was eventually made available to policy-makers and important stakeholders across the European Union.⁸⁵

The selection of case study areas was designed to capture differences in soil degradation, soil types, climate, farming practices, institutional settings, and policies.⁸⁶ The implementation was very detailed in its initial research. Initially, research was done on the area and region to determine the exact soil issue (run-off, contamination, top-soil loss, etc.).⁸⁷ Case studies were carried out in Belgium, Bulgaria, the Czech Republic, Denmark, France, Germany, Greece, Italy, Spain, and the United Kingdom in 2008.⁸⁸ The results of the case studies were elaborated through discussions at stakeholder presentations.⁸⁹ Many of the results were region-specific; however, there were many overlapping conclusions regarding implementation and community involvement, which can now be used to help guide

78. *SoCo Project*, *supra* note 13, at 18.

79. *Id.*

80. *Id.*

81. *Id.* at 17.

82. *Sustainable Agriculture and Rural Development*, AGRILIFE (last visited Mar. 6, 2017), http://agrilife.jrc.ec.europa.eu/rural_soco.htm [hereinafter AGRILIFE].

83. EZIO RUSCO, ET AL., *SUSTAINABLE AGRICULTURE AND SOIL CONSERVATION (SOCO PROJECT): CASE STUDY REPORT (WP2 FINDINGS) – ITALY 11* (Sept. 2008).

84. *Id.*

85. *Id.* at 17.

86. *SoCo Project*, *supra* note 13, at 65.

87. *Id.* at 65–66.

88. *Id.* at 22.

89. AGRILIFE, *supra* note 82.

future projects.⁹⁰

The SoCo Project focused on two specific farming systems, conservation agriculture and organic agriculture, and detailed a range of practices based in each system.⁹¹ The review considered the system's impact on soil quality and assessed uptake and effects.⁹² Some of the conservation practices used were: no-tillage and reduced tillage, permanent soil-cover crops, crop rotation, ridge tillage, contour farming, sub-soiling, intercropping, grassland establishment, agro-forestry, buffer strips, and terracing.⁹³ These practices were selected because of their potential to remedy soil degradation processes.⁹⁴

While each of these practices is fascinating and important, a discussion of a select few is sufficient to establish understanding. For example, one practice used is ridge tillage, which entails cultivating crops on pre-formed ridges. Ridge tillage allows moisture to be more effectively maintained within the soil, preventing erosion and run-off.⁹⁵ Another practice used is intercropping. Intercropping is the growth of two or more crops in the same field during a growing season to promote the interaction between them.⁹⁶ As in any diverse ecosystem, the interaction between complementary plants enhances the overall stability of the system, including a significant resilience against pests, diseases, and weeds.⁹⁷ Both ridge-tilling and intercropping minimize the risk of soil degradation by increasing the organic nutrients and preventing run-off and erosion.⁹⁸ The research found that labor and costs also decreased.⁹⁹

Finally, the study found that organic farming has significant positive effects on the nutrition of soil.¹⁰⁰ When organic farming is employed, energy consumption is decreased and water quality is maintained, due to less run-off and the use of organic fertilizers.¹⁰¹

D. Challenges with Implementation

In almost every region, adoption of long-term organic or conservation farming techniques faced numerous obstacles, such as inadequate machinery, and lack of information for farmers.¹⁰² Farmers needed extensive training and access to skilled advisory services.¹⁰³ Compared to conventional farming, the study found that a fundamental change in approach is required. Additional economic factors,

90. *SoCo Project*, *supra* note 13, at 22.

91. *Id.* at 19.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 38.

96. *Id.*

97. *Id.*

98. *Id.* at 19.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 23.

103. *Id.* at 25.

including the costs of new machinery and the risk of income loss during transition periods, were also barriers.¹⁰⁴ Lastly, some local policy measures have not been appropriately targeted.¹⁰⁵ The effectiveness of policy measures could be significantly increased if the reference levels were clearly defined, incentive payments were better targeted and monitored, and if greater levels of advice and support were provided.¹⁰⁶

While, initially, the conservation techniques of the SoCo Project produced positive effects, many of the promising practices for the sustainable management of agricultural soil were not consistently adopted.¹⁰⁷ Economic factors barred implementation.¹⁰⁸ The costs of new machinery and the risk of income loss during transition periods were not adequately handled and policy measures did not appropriately target these concerns.¹⁰⁹ For example, farmers in Italy were given instructions on how to "terrace" their crops, a technique consisting of planting within leveled platforms, similar to stairs, up a hillside.¹¹⁰ Terracing is beneficial for the soil's infiltration rate and can help control water erosion.¹¹¹ However, high maintenance and costs led farmers to abandon terracing.¹¹²

Moreover, switching to conservation agriculture might require up-front costs in equipment.¹¹³ In the study, Finland and Greece show the highest uptake of no-tillage, but reduced tillage was practiced on about half of the crop land.¹¹⁴ As the study indicated, conservation agriculture is very site-specific, which could be a possible future challenge to implementation. Conservation agriculture may be too complex for a particular region, if the farmers do not have resources to be trained, implementation will be barred.¹¹⁵ The study also indicated that while the farmers were aware of the challenges in implementing the techniques, they did not consider them urgent.¹¹⁶ Further, stakeholders in many of the regions indicated there was not an infrastructure for soil conservation advice for farmers.¹¹⁷

E. Results

When the SoCo Project conducted a survey of policy implementation at regional levels across the European Union, the results indicated that the existing policy measures had the potential to address all recognized soil degradation

104. *Id.* at 23.

105. EZIO RUSCO, ET AL., *supra* note 83, at 120.

106. *SoCo Project*, *supra* note 13, at 134.

107. *Id.* at 23.

108. *Id.*

109. *Id.*

110. *Id.* at 39.

111. *Id.*

112. *Id.*

113. *Id.* at 19.

114. *Id.*

115. *Id.*

116. *Id.* at 23.

117. *Id.* at 93.

processes.¹¹⁸ Policies were only implemented when there was already a support system in place or in order to prevent great damage (if it was determined that taking on the risk that the policies would not be properly implemented was worth the risk).¹¹⁹ The study found that when mandatory measures were implemented, awareness and implementation was increased.¹²⁰ This may inform policy-makers that techniques may be legislatively-forced.

There was an unfortunate lack of data on the levels of soil degradation in many areas and limited monitoring of the impacts of adopting specific farming practices.¹²¹ This left uncertainty as to which practices to put in place.¹²² The techniques were most successful when the commission focused on a very specific set of improvements, tailored to the land.¹²³ It was *not* successful when the commission tried to implement a practice or technique that had worked in other areas, without tailoring it to that particular land.¹²⁴ Additionally, techniques were more successful when they were implanted in areas where they received widespread recognition, and where the techniques were mandatory.¹²⁵

F. Recommendations and Extrapolation

Farm advisory services should support the implementation of farming practices aimed at sustainable soil use. In order to do so, projects should have a baseline of information from which data can be estimated and measured.¹²⁶ This would allow better future evaluation of the impact of soil conservation measures adopted and inform future implementation¹²⁷

Proper implementation of permanent soil conservation techniques requires policies that provide incentives for farmers and communities.¹²⁸ Policy makers and stakeholders must understand which agricultural practices are sustainable and for which particular regions.¹²⁹ Further, implementation must be supported and monitored to provide long-term success.

VI. CONCLUSION

The solution to global economic issues, poverty, and environmental degradation concerns lies beneath our feet, in the soil. The precedence and growth of modern agriculture under the “Green Revolution” brought about hugely problematic global changes for the climate and human security. Modern

118. *Id.* at 21.

119. *Id.* at 44.

120. *Id.* at 23.

121. *Id.*

122. *Id.*

123. *Id.* at 113.

124. *Id.*

125. *Id.* at 117.

126. *Id.* at 26.

127. *Id.*

128. *Id.* at 134.

129. *Id.* at 26.

agricultural practices have caused significant environmental degradation leading to social problems such as global hunger and poverty. The SoCo Project was implemented to increase crop yield, while still maintaining the integrity of the soil. The SoCo Project concluded that information and advice are essential to support any changes in farming practices. Additionally, one of the SoCo Project's successes was the intense research that went into the project before anything was even implemented. This project should stand as a model for the obstacles and successes involved in the global implementation of sustainable agriculture projects.

SALVAGING THE UNITED NATIONS REDD PROGRAM AGAINST THE BACKDROP OF INTERNATIONAL HUMAN RIGHTS VIOLATIONS

Joshua Hammond*

The United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD) is an intergovernmental framework designed “to reduce forest emissions and enhance carbon stocks in forests while contributing to national sustainable development.”¹ Deforestation—the permanent removal of forest cover—contributes significantly to global carbon dioxide emissions.² This, in turn, contributes to global climate change which adversely affects the livelihood of indigenous peoples and forest-dependent communities. REDD allows for nations and private stakeholders to offset their own carbon emissions by purchasing carbon stock stored inside forests, and, in effect, keep them standing.

However, nearly ten years after its launch, critics have scrutinized REDD for its impracticality. Additionally, many critics have recently shifted their critiques towards the program’s unintended consequences. This sector of critics argues that, despite its many potential environmental benefits, REDD effectively permits violations of the international human rights of many indigenous peoples and forest-dependent communities worldwide.³ Herein lies the conundrum, illuminated by a particularly bizarre tension in which the program’s widespread benefits also impose significant, countervailing costs.

Ultimately, the United Nations (UN) must prioritize safeguarding the international human rights of indigenous peoples while simultaneously striking a balance between REDD’s program efficiency and transparency. In the face of financial adversity, socio-cultural confusion, and lower political bargaining power status, indigenous peoples and forest-dependent communities must proactively assert their political voices. This must occur first locally and regionally as an entryway to national and international negotiations. Indigenous peoples and forest-dependent communities must first identify what they perceive as negative

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1. 15th Conference of the Parties to the United Nations Framework Convention on Climate Change, Copenhagen, Den., Dec. 7-18, 2009, Copenhagen Accord, P 6 U.N. Doc. FCCC/CP/2009/L.7 (Dec. 18, 2009) [hereinafter Copenhagen Accord].

2. Jeri Curley, *How Deforestation Affect the Air?*, SCIENCING (Apr. 25, 2017), <http://sciencing.com/deforestation-affect-air-10632.html>.

3. Victoria Arthaud, *Environmental Destruction in the Amazon: Can U.S. Courts Provide a Forum for the Claims of Indigenous Peoples?*, 7 GEO. INT’L ENVTL. L. REV. 195, 196 (1994).

inflictions on their rights and sovereignties at a grassroots level. This Article posits that indigenous peoples and forest-dependent communities can garner international attention, funding, and support by cooperating closely with public and private entities that have mutually invested interests in REDD. Together, these forces can direct their efforts towards targeted application of local, national, and international legal frameworks that provide clarity, uniformity and a more likely avenue for change and enforcement.⁴

Part I of this Article traces the origin and purpose of REDD. Part I also examines the program's significant role in implicating political and socio-cultural issues and its effects on indigenous peoples and forest-dependent communities. Part II addresses international laws and regulations that seek to protect the international human rights of indigenous peoples. Part III analyzes the strengths and weaknesses of Brazil's national mitigation strategies, which are unassociated with the UN and REDD altogether. This section also compares Ecuador's REDD-stamped national strategy to that of Brazil's, and lends particular focus to the widespread neglect of international human rights effectuated by emissions reduction plans in both of these Amazon countries.

Part IV of this Article offers suggestions that can not only enhance the existing REDD framework, but can also provide an avenue by which the voices and demands of indigenous peoples and forest-dependent communities are not stifled. Finally, Part V of this Article concludes by reframing the juxtaposition between REDD and the international human rights of indigenous peoples in order to demonstrate how the two are intertwined.

I. THE UN REDD PROGRAM AND REDD+

The United Nations Framework Convention on Climate Change (UNFCCC) tasks itself "to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."⁵ REDD+, borne in 2010 out of the UNFCCC's mission, supports national mitigation strategies and promotes "the informed and meaningful involvement of all stakeholders, including indigenous peoples and other forest-dependent communities."⁶ Accordingly, the UN REDD program supports the nationally enforced REDD+ frameworks by offering results-based payments to incentivize developing countries to reduce or remove forest carbon emissions.

REDD currently serves sixty-four nations from Africa, Asia-Pacific, Latin America, and the Caribbean.⁷ The program provides a range of funding mechanisms such as support to the design and implementation of national REDD+

4. Stephanie Baez, *The "Right" REDD Framework: National Laws that Best Protect a REDD Regime*, 80 FORDHAM L. REV. 821 (2011).

5. Greenhouse Gas Inventory Data, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/ghg_data/items/3800.php.

6. Nicholas Anderson, *REDDy or Not? The Effects on Indigenous Peoples in Brazil of a Global Mechanism for Reducing Emissions from Deforestation and Degradation*, 2 J. SUSTAINABLE DEV. 18 (2009).

7. Partner Countries, UN-REDD PROGRAMME, <http://www.un-redd.org/partner-countries>.

programs, tailored support to national actions, and technical capacity building support through the sharing of expertise, common approaches, best practices, and facilitated knowledge sharing.

These funding mechanisms support five REDD initiatives: reducing emissions from deforestation; reducing emissions from forest degradation; conservation of forest carbon stocks; sustainable management of forests; and the enhancement of forest carbon stocks. The five REDD initiatives can be practicably implemented at different phases to achieve results-based actions such as the effectuation of comprehensive national strategies, sustainable development plans, and capacity building measures. It is important to recognize that the capacities and circumstances of participating countries can vary immensely. As a result, the magnitude and pace at which countries are able to provide oversight and decision-making fluctuate.

A. The Copenhagen Accord Fails to Capture a REDD Framework

In November of 2009, the 15th Conference of the Parties (COP) of the UNFCCC (COP-15) gathered in Copenhagen with the hopes of securing a binding post-Kyoto Protocol agreement. Unfortunately, the Copenhagen Accord was deemed a failure for its inability to legally bind the 193 ratifying Parties or manifest into anything of significance.⁸ Notwithstanding this grave impasse, the COP-15 did ensure the continued importance of forest emissions reduction strategies in shaping future legislation and agreed that an incentive-based emissions reductions credit would be one of the centerfold selling points of any binding multi-national agreement.⁹ Still, the Copenhagen Accord only provided vague guidelines for explaining the scope of REDD and did not construct concrete plans to pursue specific initiatives.

B. Cancun: From REDD to REDD+

In December of 2010, following the disappointing and unfulfilling Copenhagen Accord results, the 16th Conference of the Parties (COP-16) gathered in Cancun to discuss the possibility of formulating a binding successor agreement to the Kyoto Protocol.¹⁰ The Cancun Adaptation Framework (CAF) marked the international community's shift in thinking. Rather than focusing solely on binding constituents to a specific agreement, the COP-16 enhanced the access and implementation of mitigation strategies vis-à-vis capacity-building mechanisms. The rationale was that, by creating a foundation for the good faith exchange and sharing of information, those countries initially opposed to the Kyoto Protocol will be more likely to bind themselves by signing onto a mandatory, international REDD instrument. Although the attempt to effectuate a binding post-Kyoto

8. Maron Greenleaf, *Using Carbon Rights to Curb Deforestation and Empower Forest Communities*, 18 N.Y.U. ENVTL. L.J. 507, 527 (2011).

9. Copenhagen Accord, *supra* note 1.

10. KATERYNA HOLZER, *CARBON-RELATED BORDER ADJUSTMENT AND WTO LAW 14* (Edward Elgar Publishing, 2014).

Protocol agreement failed, Parties to the COP-15 considered the worldwide reduction of forest carbon emissions worldwide to be of paramount importance. The COP-15 negotiations vowed to bring the rising temperature of the Earth below 1.5 degrees Celsius above pre-industrial levels.

Accordingly, the COP-16 assigned their steadfast commitments to REDD+ within the CAF. For example, evidence compiled in 2006 by the UN Intergovernmental Panel on Climate Change (IPCC) substantiated the COP-16 decision calling for immediate intervention.¹¹ The IPCC report found that the “forestry sector is responsible for 17.4 percent of global [greenhouse gas (GHG)] emissions, placing it above the transportation and industry sectors, which account for 14 percent of global emissions each.”¹² The IPCC report also signifies the harmful and compounding effects of forest destruction.¹³ The consequences of prolific and unrestricted forest destruction are two-fold in that “not only is the carbon sequestered in each tree released into the atmosphere, but also the remaining forest’s capacity to absorb carbon from the atmosphere is diminished.”¹⁴

The CAF requires that ratifying Parties to the Kyoto Protocol who choose to implement the REDD program and REDD+ initiatives must satisfy several program requirements, such as: a nationally appropriate mitigation actions (NAMAs); national forest reference emission levels; robust and transparent national forest monitoring systems and; systems for providing information on how REDD+ safeguards are being addressed and respected throughout the implementation of REDD+, while simultaneously respecting sovereignty.¹⁵

II. INTERNATIONAL HUMAN RIGHTS

The 1948 Universal Declaration of Human Rights (UDHR), although not binding, is considered the foundation of international human rights law. Despite this seminal mandate, international laws and regulations can be vague and circumstantial. For example, Article I of the UDHR states that all human beings are “endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”¹⁶ Nevertheless, the UDHR has inspired subsequent legislation that “represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone.”¹⁷

A. *Laws Impacting Indigenous Peoples and Forest-Dependent Communities*

In 1976, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)

11. Baez, *supra* note 4, at 827.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 831.

16. G.A. Res. 217 (III)A, Universal Declaration of Human Rights art. 1, (Dec. 10, 1948) [hereinafter UDHR].

17. *Id.* art. 17.

emerged from the UDHR.¹⁸ These two covenants proposed core principles underlying the defense of human rights, such as the right to life, equality before the law, and freedom of expression.¹⁹ This trifecta, consisting of two covenants along with the cornerstone UDHR, forms the International Bill of Human Rights (IBHR).

In September of 2007, the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).²⁰ Although UNDRIP is not legally binding, it creates a set of standards and legal norms governing the treatment of indigenous peoples with the intention to eliminate discrimination and human rights violations. UNDRIP is a decades-long culmination of generational efforts aimed to shed light on how global climate mitigation strategies infringe upon human rights. These infringements, in turn, inherently affect mitigation strategies due to disrupting civil peace, disturbing infrastructures and natural mechanisms within local and state government, and, in some instances, negligently harming the environment or ecosystem.²¹ Currently, states that are members to the U.N. have “ratified at least one of the nine core international human rights treaties, and 80 percent have ratified four or more, giving concrete expression to the universality of the UDHR and international human rights.”²²

Notwithstanding the protections afforded to indigenous peoples in the litany of international human rights standards and laws, scholars and experts have begun to examine the inadvertent consequences of actions taken to combat climate change. University of Sydney legal scholars Lee Godden and Maureen Tehan suggest that a future climate change justice framework should explore more critically the unintended consequences that climate change policies place upon indigenous and local communities, specifically with respect to REDD and REDD+.²³ Their research demonstrates that there are 1.5 billion people “who live in forested areas or who are closely dependent on forests and associated areas such as savannah, including many indigenous communities.”²⁴ Therefore, REDD+ affects roughly 20% of the world population.²⁵

18. ICCPR, OHCHR.ORG, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (last visited May 17, 2017).

19. ICESCR, OHCHR.ORG, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (last visited May 17, 2017).

20. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

21. Maxi Lyons, *A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress*, 32 DENV. J. INT'L L. & POL'Y 701 (2004).

22. The Foundation of International Human Rights Law, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (last visited May 17, 2017).

23. Lee Godden & Maureen Tehan, *REDD+: Climate Justice and Indigenous and Local Community Rights in an Era of Climate Disruption*, 34 J. ENERGY & NAT. RESOURCES L. 95 (2016).

24. *Id.* at 99.

25. 2017 World Population Data Sheet With A Special Focus on Youth (Population Reference Bureau, 2017), http://www.prb.org/pdf17/2017_World_Population.pdf (stating the world populations is 7.5 billion).

B. Implications and Lack of Legal Clarity

The U.N. REDD program is capable of equipping nations, private companies, and especially local communities with the essential tools, technology, and funding to mitigate the effects of forest degradation, deforestation, and the sinking levels of forest carbon stocks. Indeed, one of the program's foremost strengths is its heavy orientation towards a capacity building approach. This requires that nations implement NAMAs and follow requirements to file recorded data and procedures implemented. However, conflicts between national and state laws, such as the recognition of land carbon ownership in Brazil, remain unresolved. For example, the Brazilian national government does not specifically address "the legal nature and ownership of carbon credits or rights to greenhouse gas (GHG) emission reductions and/or removals."²⁶ However, some legislation at the state level "refers to rights derived from measures that reduce or remove GHG emissions, but [still] stops short of clearly stating how these rights to emission reductions are to be treated outside the governmental programs they create."²⁷ This clouds the assumption that nations should not only protect the rights of their citizens, but they should also provide their citizens with a means of identifying those rights. To establish a cohesive regulatory strategy, nations like Brazil are beginning to promote a policy that rewards REDD+ actions at all levels.²⁸

Realistically, the respect that is afforded to human rights protections varies from nation to nation, and each nation interprets those safeguards in starkly different ways. Moreover, the potential number of different interpretations that could result serves to convolute the underlying intent of the UN's human rights doctrine. For example, REDD+ initiatives currently in existence "differ on everything from their definitions of 'forest' to their methods of financing...causing scholars to note that the only shared attribute in REDD programs is a lack of clarity."²⁹ Thus, the lack of clarity makes it difficult for nations to uniformly implement the laws.

Without clarity there cannot be an international consensus on REDD as a program, nor can there be universal understanding as to the proper functioning of REDD+ initiatives. Any legal system without clarity and consistency in terminology is likely to fail. More importantly, a legal framework absent any clear understanding, be it maybe ambiguous or pathological, is unlikely to deter acts that violate international human rights.

III. CASE STUDIES IN THE AMAZON RIVER BASIN

The implementation of Brazil's plans for reduced forest emissions exemplifies how a national mitigation program akin to REDD could breed success. However, a case study on Brazil's voluntary reduced emissions plan also shows

26. World Bank, *Carbon rights in Brazil*, FOREST CARBON PORTAL, <http://www.forestcarbonportal.com/resource/carbon-rights-brazil>.

27. *Id.*

28. *Id.*

29. Baez, *supra* note 4, at 832.

how the program can operate with complete ineffectiveness due to conflicts between federal and state laws. By comparison, investigating the relative successes of the Ecuadorian REDD plan reveals how other nations and private companies can begin to consider a range of alternatives that may fit their specialized needs without experiencing significant drawbacks and international human rights violations.

A. Brazil

Brazil has the largest area of tropical forest and the highest rate of deforestation globally.³⁰ However, in an interesting twist of logic, Brazil is not a member to the UN's REDD program, nor is it a participant of the Forest Carbon Partnership Facility (FCPC). FCPC is a "global partnership of governments, businesses, civil society, and indigenous people focused on reducing emissions from deforestation and forest degradation."³¹ Instead, Brazil implements and subsequently funds its own NAMA-type initiatives.³² Brazil's decision to opt out of REDD and the FCPC was tactically measured. If Brazil was a member of these two programs, it would be obligated to assist in funding the program's operations, thereby diverting financial support to other countries instead of wholly investing in itself. Therefore, Brazil's national action plan is an entirely voluntary mechanism to implement initiatives akin to REDD+ activities currently in existence. This strategy is likely motivated by the fact that Brazil perennially experiences the highest deforestation rates in the world.³³ Despite its distance from REDD, Brazil was "approved to become a pilot country under the Forest Investment Programme (FIP) of the World Bank."³⁴

One initiative under this separate arrangement is Brazil's creation of the Amazon Fund in 2008, which "received a grant of USD 1 billion from Norway, to be paid over seven years and, more recently, the German government donated USD 29 million to the Fund."³⁵ Brazil's deforestation rates have dropped from 0.46% per year in 2005 to 0.15% per year in 2010, which leads one to believe that its national strategy will continue to produce encouraging results.

Brazil set a benchmark for a nationwide emissions reduction of "36.1% to 38.9% below 2005 levels by 2020," but it does not yet have a national framework that officially regulates and enforces this initiative or others created in the REDD spirit.³⁶

Despite its recent initiatives to cut carbon emissions, Brazil's twentieth

30. Forests of Brazil, INFORMATION FOR ACTION, http://www.information.org/mp3/index.php?main=forbra_intro&subject=Forests/Brazil.

31. About FCPF, FOREST CARBON PARTNERSHIP FACILITY, <https://www.forestcarbonpartnership.org/about-fcpf-0> (last visited May 17, 2017).

32. Brazil. An Overview from the REDD Countries Database, REDD DESK, <http://theredddesk.org/resources/brazil-overview-redd-countries-database> (last visited May 17, 2017).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

century history is entrenched in rampant deforestation that has effect to this day. Beginning in the 1940s, Brazil began to develop the Amazon Basin as part of a national program. Because of this process, scientists estimate that “[17] percent of the Amazon has already been lost and some scientists predict that 55 percent will be destroyed by 2030.”³⁷ Additionally, it is likely that Brazil will continue to experience difficulties aligning national interests because of the interplay between federal and state laws. In particular, the conflict of laws pertaining to forest governance makes it difficult to “navigate a complex system of land rights that uses both customary and statutory law.”³⁸

Although the rapidly growing forest carbon market has popularized the REDD program’s positive goals, many indigenous groups and forest-dependent communities in Brazil harbor negative expectations for mitigation activities. These groups believe that there is corrupt management running unchecked in pilot projects that will ultimately harm the Amazon Basin, its forests, and those who depend upon them.³⁹ According to legal scholar Stephanie Baez, “forest-dwelling indigenous communities worry that REDD will destroy their livelihoods.”⁴⁰ Since national laws govern the implementation of emissions reduction initiatives, a revamped legal framework, built on a national level, will be instrumental for actively and effectively addressing the concerns of indigenous peoples and forest-dependent communities.

The absence of real enforcement, however, has made the indigenous and forest-dependent communities weary. The government and private investors who profess to enact emission reductions measures in Brazil’s Amazon basin continuously fail to enforce them at the direct disadvantage of indigenous and forest-dependent communities. This failure cyclically instills in indigenous peoples and forest-dependent communities’ feelings of fear, danger, and distrust towards both the measures and those purporting to implement them. This fear is not misguided or cynical. In a number of unfortunate cases, poorly regulated emissions reduction pilot programs have directly led to the destruction of natural habitats and national infrastructures.⁴¹

B. Ecuador

Ecuador is a geographically diverse nation with the majority of its forest biomass located in the Amazon region.⁴² In 2009, Ecuador implemented its national development plan aimed at reducing its emissions from deforestation by 30% from 2009 to 2013. Due to its effective system of governing REDD+ initiatives at the national level, Ecuador has experienced enormous success in achieving this reduction goal. According to Ecuador’s Ministry of Environment,

37. *Id.*

38. *Id.*

39. Baez, *supra* note 4, at 823.

40. *Id.* at 821.

41. Arthaud, *supra* note 3, at 197.

42. REDD in Ecuador, REDD DESK, <http://theredddesk.org/countries/ecuador>.

the country continues to experience significant reductions in its annual deforestation rate.⁴³ For example, in 2000, an “estimated 198,000 hectares (ha) of forest were being lost every year, equivalent to an annual deforestation rate of 1.5%.”⁴⁴ The Ministry of Environment recently released data indicating that the national deforestation rate is astoundingly lower than it was in 2000, the deforestation rate is nearing that of 0.6%.⁴⁵

Ecuador conceived the Socio Bosque Program (SBP), an incentive-based policy for forest conservation to combat deforestation and cut its emission rate.⁴⁶ SBP is an Ecuadorian program totally separate from other U.N. REDD initiatives. Through national and self-governed REDD activities such as SBP, Ecuador has managed to provide financial incentives to private companies, indigenous peoples, and forest communities to conserve forest carbon stocks.⁴⁷ Additionally, Ecuador implemented a system of equal communication, representation, and protection to better effectuate the slowing in deforestation.⁴⁸ According to data collected by The Redd Desk, a collaborative resource for REDD information sharing and preparation, the “SBP has achieved conservation agreements with private individuals and indigenous community partners to conserve a total of 883,223 ha of native forests with estimated benefits for more than 70,000 people.”⁴⁹

Critics of REDD might suggest that Ecuador does not actually protect the international human rights of indigenous peoples and that the SBP conservation agreements do not accurately depict the current, hostile environment that indigenous peoples and forest-dependent communities face in Ecuador. For example, critics might point to the early 1960s when the oil conglomerate Texaco (now Chevron Corp.) “extracted oil and dumped toxic waste in [the] Amazon rainforest using methods and technology that were obsolete and non-environmentally friendly” and adverse to the human rights of indigenous peoples.⁵⁰ As a result of Texaco’s skirting the American Petroleum Institute’s minimum standards for oil exploitation for nearly twenty-five years, the greater part of Ecuador’s infrastructure was left dilapidated.⁵¹

However, proponents of REDD-type initiatives would argue that, since the ousting of Texaco from the Ecuadorian economy, the nation has experienced a rejuvenated commitment to protecting the environment and human rights of indigenous people. For instance, in 2008, Ecuador “ratified the first national constitution in the world to enshrine the Rights of Nature,” which acknowledges

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. REDD in Ecuador, *supra* note 42.

49. *Id.*

50. Nathalie Cely, *Balancing Profit and Environmental Sustainability in Ecuador: Lessons Learned from the Chevron Case*, 24 DUKE ENVTL. L. & POL’Y F. 353 (2014).

51. *Id.* at 355–56.

that nature has the right to exist just as all other life forms.⁵² This unprecedented step constitutionalized the rights of nature while also protecting the rights of indigenous peoples and forest-dependent communities. Rather than treating nature as property under the law, as is common in other nations, Ecuador's new constitution allows "any person, community, village, or nationality to require the public authority to enforce the rights of nature."⁵³ Thus, in the wake of Texaco's dealings in Ecuador, indigenous peoples and forest-dependent communities have forged a more amicable relationship with the national government. These peoples can more easily raise grievances to an inclusive national body that values and respects indigenous peoples' roles in protecting the rights of nature. The Ecuador case study shows that the REDD program can be constructive and used to improve international human rights protections and practices.

IV. RECOMMENDATIONS

An interplay between private and public entities mutually invested in the REDD program may lead towards a path of beneficial action, development, and understanding. Integration of private and public initiatives, such as in funding and developing initiatives like the Governor's Climate and Forest Task Force (GCF), could provide a successful and different approach. GCF provides support to regional and provincial programs by advancing subnational policies, stimulating collaboration with public and private sector stakeholders at multiple levels, and channeling financial support to develop more effective approaches to REDD+. By merging these often competing entities under the common goal of unifying their interests and protecting the human rights of indigenous peoples, the viability is far greater than it would be if they acted separately. For example, the GCF emerged as a subnational coalition between thirty-seven states—including provinces from Brazil, the United States, and five other nations—focused on supporting jurisdictional programs designed to reduce emissions from forest degradation by linking compliance to a pay-for-performance regime.⁵⁴ A system incentivizing the cooperation of the private and public sectors in promoting international human rights is not only harmoniously collaborative, it is also practicable.

Alternatively, nations contracting with private companies and non-governmental organizations should be able to penalize un-abiding contractors, directly, through financial penalties, and indirectly, through global shaming. This could manifest through nations boycotting businesses that do not comport with their rules and regulations, just as Ecuador did in expelling Texaco from its oil and labor markets. In the event of a direct penalty, all REDD+ Parties should follow the example set by Ecuador. In this instance, by nationalizing a NAMA, and imposing sanctions upon noncompliant actors. In the most ideal scenario, nations should constitutionalize the Rights of Nature, as Ecuador did, mandating that the

52. *Id.* at 353.

53. CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, art. 71.

54. ABOUT, GOVERNORS' CLIMATE & FORESTS TASK FORCE, <http://www.gcftaskforce.org/about> (last visited May 17, 2017).

treatment of environmental rights and the rights of indigenous peoples be one in the same.

Some challenges that might thwart constructive collaboration between nations and private investors are regulatory enforcement and funding. Certainly, Ecuador took an extreme measure in expelling Texaco, but it resolutely followed through with that measure by indoctrinating environmental rights and indigenous peoples' rights in its constitution. This has been difficult and costly for Ecuador and is a highly controversial matter. Brazil also faces serious obstacles that "undermine [the] application of Brazilian constitutional and legal precepts regarding indigenous lands."⁵⁵ Dinah Shelton, Professor of International Law at George Washington University, points to three specific schemes that usurp the lands and possessions of indigenous peoples in Brazil: i) the creation of new municipalities within indigenous lands divides the local indigenous peoples physically and politically; ii) local power relations tend to favor the settlement of nonindigenous peoples and has resulted in the facilitated migration of squatters into most of the indigenous areas; and iii) the passage of major roadways in indigenous areas, paired with forced evictions, brings disease into the region, which renders indigenous areas vulnerable to exploitation.⁵⁶ If, at the outset of their business operations, private companies can establish symbiotic business relationships with the nations in which they are dealing, they will be able to comply with environmental regulations while safeguarding international human rights. In such event, drastic measures against noncompliant actors, such as those taken in the Ecuador-Texaco ordeal, can be avoided.

V. CONCLUSION

In conclusion, the UN must recognize that its current safeguards purporting to protect the human rights of indigenous peoples and forest-dependent communities, codified in REDD+, are not functioning properly. This hearkens back to the fact that REDD was not intended to protect the human rights of indigenous peoples; rather, those safeguards were of secondary and tertiary concern. It is critical that the COP, and specifically the REDD+ Parties, re-conceptualize international human rights and its intersection with REDD through this lens. The UN cannot escape the inexorable truth that its REDD program subjugates the rights and quells the voices of indigenous peoples and forest-dependent communities. Particularly in Brazil, local and national authorities pose numerous threats to protecting the rights of indigenous peoples. By mustering civil unrest, excising indigenous peoples' governments from local and national processes, and deliberately intruding into indigenous areas to displace weakened communities and expropriate their resources, authorities seek to attack the integrity of indigenous land rights. Despite compliance with REDD programs, private entities continue to perpetrate great harms on indigenous and forest-dependent communities in the Amazon basin,

55. Dina Shelton, *Environmental Rights and Brazil's Obligations in the Inter-American Human Rights System*, 40 GEO. WASH. INT'L L. REV. 733, 757 (2009).

56. *Id.*

evident by the commandeering of land, shedding of violence in their communities, and the de-legitimization of the sovereignty, land tenure, and human rights of indigenous peoples. This Article offers a riposte to the obstacles that indigenous peoples and forest-dependent communities continue to encounter. Indigenous peoples and forest-dependent communities must seek to garner international attention, funding, and support from the concerted efforts by public and private actors. If these forces integrate, a targeted application to uniformly define human rights legal frameworks can provide clarity and perpetuate positive change.

HONOR KILLING AND THE INDIGENOUS PEOPLES: CULTURAL RIGHT OR HUMAN RIGHT VIOLATION?

Sarah Alsabti*

I. INTRODUCTION

Many sources define honor killing as the premeditated murder of a girl or a woman.¹ The murderer who commits this crime is usually one of the girl's or woman's family members like her brother, father, or a combination of male agnates.² The murderer commits this crime to restore the family's social reputation.³ The killer believes he is preserving the family's honor by using methods like shooting, stoning, burning, burying alive, strangling, smothering, and knifing the victim to death.⁴

This premeditated murder is the result of the woman's unacceptable behavior. An example of unacceptable behavior would be an extra-marital sexual relationship.⁵ Another example would be a pre-marital relationship with a male that is not approved by the family for the single woman.⁶

Honor killing is not a new phenomenon. In fact, honor killing has existed since Ancient Roman times.⁷ Since that time, honor killings have been recorded in many countries.⁸ This global phenomenon has occurred in developed countries as well as developing countries.⁹ Honor killings have taken place in many countries such as the United States, Afghanistan, Brazil, Israel, Egypt, Pakistan, Palestine, and Jordan.¹⁰

Unfortunately, honor killing is not just part of human history; it still exists in the current century. In 2000, the United Nations Population Fund (UNFPA)

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1. AMIR H. JAFRI, HONOUR KILLING DILEMMA, RITUAL, UNDERSTANDING 18 (2008).

2. *Id.*

3. *Id.*

4. *Impunity for Domestic Violence, 'Honour Killings' Cannot Continue – UN Official*, U.N. NEWS CENTRE (Mar. 4, 2010), <http://www.un.org/apps/news/story.asp?NewsID=33971&Cr=violence+against+women&Cr1#.VwyD6l-cGDt>.

5. AMIN A. MUHAMMAD, PRELIMINARY EXAMINATION OF SO-CALLED 'HONOUR KILLINGS' IN CANADA 2 (Dep't. of Justice Can., 2010).

6. *Id.*

7. *Id.* at 18.

8. *Id.* at 17.

9. *Id.* at 18.

10. *Id.* at 17–20.

concluded that there are at least 5,000 honor killings worldwide every year.¹¹ When the issue of honor killing is discussed under the international spotlight, Jordan and Pakistan are the two countries that garner the most attention.¹²

Honor killing is a part of Jordan's contemporary society. The population of Jordan is estimated to be 6.5 million inhabitants.¹³ A recent report by Rana Hussein estimates that there are about twenty honor killings every year in Jordan.¹⁴ My motivation to write this Article stems from the death of these twenty individuals. This Article focuses on the honor killing situation in Jordan. Section II of this Article discusses domestic law and the cultural context. Part A of Section II illustrates honor killing in the Arabic culture, including an interview with a murderer and his judge to illustrate the society's power. Part B of Section II describes the domestic law in Jordan which does not provide deterrent punishment or sufficient protection for women. Section III is a cultural relativism legal analysis. This section begins by explaining the ideas of cultural relativism and universalism. This section includes some of the international laws that address the indigenous people and their right to practice honor killing in their culture. It includes two international laws: International Labor Organization Convention No.169¹⁵ and United Nations Declaration on the Rights of Indigenous Peoples.¹⁶ Section IV focuses on the international human rights legal analysis. This section starts with general information about the United Nations and its point of view about the violence against women in general and honor killing specifically. Then it describes the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Declaration on the Elimination of Violence Against Women, and United Nations resolutions. The last section of this Article, Section V, explains Jordan's efforts to follow the international legal community's decisions and recommendations to solve the honor killing issue.

II. DOMESTIC LAW AND CULTURAL CONTEXT.

This section is a spotlight on Jordan's current situation. It includes information about the Jordan cultural context and the domestic law that addresses honor killing.

A. *Honor Killing in the Arabic Culture.*

Human sacrifice is a historical aspect of cultures around the world. The reasons for human sacrifice vary.¹⁷ Some victims are sacrificed for social order, while others

11. *Id.* at 3.

12. 'HONOUR' CRIMES, PARADIGMS, AND VIOLENCE AGAINST WOMEN 199 (Lynn Welchman & Sara Hossain eds., 2005).

13. Manuel Eisner & Lana Ghuneim, *Honor Killing Attitudes Among Adolescents In Amman, Jordan*, 39 AGGRESSIVE BEHAV. 405, 406 (2013).

14. *Id.*

15. Indigenous and Tribal Peoples Convention, C169 Sept. 5, 1991, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

16. G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

17. Philip Ball, *How Human Sacrifice Propped Up the Social Order*, NATURE (Apr. 4, 2016),

are sacrificed for religious reasons.¹⁸ What motivates one to commit an honor killing – is it social or religious? Interestingly, most honor killing crimes that are perpetrated worldwide (mainly in patriarchal societies or communities) emanate from cultural, not religious, roots.¹⁹

Researchers from the Cambridge University's Institute of Criminology produced a study about honor killing.²⁰ They interviewed males and females in Jordan's capital, Amman.²¹ They found that 40% of boys and 20% of girls believed that the honor killing of a woman who is "dishonoured" or has shamed the family is justified.²²

In Arabic societies, women refraining from any kind of sexual practice before marriage is ideal.²³ The hymen gives the woman a stamp of virtue and respectability.²⁴ This makes the wedding night very important for Arabic women because on this night the husband will test and announce his judgment on his wife and her family's virtue.²⁵ This is why some believe the loss of virginity is a reason to kill the woman and clear her family's shame.

In Arab culture, protecting the female's virginity is a part of the male's responsibility.²⁶ Therefore, the man has to guard and defend against any incursions of his female family member's virginity.²⁷ Any failure of this protection requires him to kill the woman to save the family's reputation or he is no longer thought of as a man.²⁸

Husseini interviewed a murderer who committed an honor killing crime as well as his judges. This interview gives a better understanding of the local culture in Jordan.²⁹

Sarhan killed his sister Yasmin, who was raped by her brother-in-law.³⁰ Yasmin turned to the police rather than her family.³¹ Sarhan went to the police station and tried to bail his sister out. The police refused his request because they thought that he might kill her because she lost her virginity.³² After a few days, Sarhan found his

<http://www.nature.com/news/how-human-sacrifice-propped-up-the-social-order-1.19681>.

18. *Id.*

19. Parliamentary Assembly, *Resolution 1327: So-called 'Honour Crimes'* (2003), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17106&lang=en>.

20. Eisner & Ghuneim, *supra* note 13.

21. *Study: Jordan 'Honour Killing' Support Strong*, ALJAZEERA (June 20, 2013), <http://www.aljazeera.com/news/middleeast/2013/06/201362054127558357.html>.

22. Eisner & Ghuneim, *supra* note 13, at 405.

23. Lama Abu Odeh, *Honor Killings and the Construction of Gender in Arab Societies*, 58 AM. J. COMP. L. 911, 916–17 (2010).

24. *Id.*

25. *Id.*

26. *Id.* at 919.

27. *Id.*

28. *Id.*

29. RANA HUSSEINI, *MURDER IN THE NAME OF HONOR* 9–13 (2009).

30. *Id.*

31. *Id.*

32. *Id.*

sister at their family home. Without saying a word, he killed her using an unlicensed gun and then turned himself in. Sarhan killed his sister to cleanse his family honor.³³

Sarhan justified killing his sister by saying that it was better that one person died, opposed to the whole family suffering shame and disgrace, even though she lost her virginity from being raped.³⁴ He illustrated his point by comparing it to a box of apples: "If you have one rotten apple, would you keep it or get rid of it?"³⁵ "I just got rid of it," he said. Then he added, "I killed her because she was no longer a virgin."³⁶

The interviewer challenged Sarhan by pointing out that his act was punishable by God and prohibited in Islam.³⁷ Sarhan's answer was, "I know that killing my sister is against Islam and it angered God, but I had to do what I had to do and I will answer to God when the time comes."³⁸ He then added that people refused to talk to him or his family as further justification.³⁹ "They told us to go cleanse our honor; then we were allowed to talk to them. Death is the end to disgrace."⁴⁰ He illustrated his words by saying that society would not stop talking about his family even if they married his sister.⁴¹ He said they would only stop talking when she was dead.⁴²

Sarhan added, "I took the stand and told the judges that I had to kill my sister, because if I did not kill her, it would have been like killing more than thousand men from my tribe." He admitted that before he killed his sister Yasmin, he sat with his family members and around eight hundred men of his tribe and they reached this decision together – that people would look down on him if he did not kill her because she was not a girl anymore and her death was the only way to erase the shame.⁴³ He added that he loved his sister deeply, but he was forced to kill her.⁴⁴

On the other hand, the interviewer asked the judge to explain how Sarhan's punishment was only six months in jail, especially when the girl was raped.⁴⁵ The interviewer also asked how Article 98 of the Penal Code applied in this case.⁴⁶ Article 98 applies when a killer commits his crime while in a state of great fury.⁴⁷ Here, it should not have applied because Sarhan planned to commit his crime. In other words, he was not in a great fury.

The judge said, "[t]he rape happened within the family, so it was clearly a family affair. Sarhan killed his sister after family encouragement, so this murder was

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

a product of our culture.”⁴⁸

B. The Domestic Law in Jordan

The Arabic culture is not the only reason to commit this crime. The domestic law in Jordan plays an essential role in honor killings. The Penal Code in Jordan’s domestic law includes some articles that give an excuse to the murderers. Those articles are Article 98 and Article 340.⁴⁹

1. Article 98

Article 98 of the Penal Code is most often used on behalf of criminals in honor killings.⁵⁰ This article is utilized when a person commits a dangerous act in a state of great fury (or “fit of fury”).⁵¹

Though both genders can benefit from this article, it is usually used to benefit men because the family usually waives their rights in honor killing crimes.⁵²

This article reduces the penalty to a minimum of one year in prison.⁵³ It is also reducible to a maximum of two years and to a minimum of six months for other felonies.⁵⁴ Moreover, if the victim’s family “waives” its right to file a complaint, the courts may further halve the sentence.⁵⁵ This means a killer can walk away as a free man after the verdict immediately if he spends the duration of his sentence in prison while awaiting his trial.⁵⁶

2. Article 340

Article 340 of the Penal Code states that:

1. He who surprises his wife or one of his female *maharms* (“unlawfuls”) in the act of committing unlawful sexual intercourse with somebody and kills, wounds or injures one or both of them, shall benefit from the exonerating/ exempting excuse (“udhr muhill”).
2. He who surprises his wife or one of his ascendants or descendants or siblings with another in an unlawful bed, and kills or wounds or injures one or both of them, shall benefit from the mitigating excuse (“under mukhaffaf”).⁵⁷

A major turning point in Jordanian law occurred in 2001 when Jordan’s government amended Article 340 by way of temporary legislation, in the absence of

48. *Id.*

49. KATHLEEN PERATIS, HONORING THE KILLERS: JUSTICE DENIED FOR “HONOR” CRIMES IN JORDAN 15, 18 (Human Rights Watch, 2004).

50. *Id.* at 18.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. ‘HONOUR’ CRIMES, PARADIGMS, AND VIOLENCE AGAINST WOMEN, *supra* note 12, at 201.

a sitting parliament. The article after it was amended became:

1. There shall benefit from the mitigating excuse ("udhr mukhaffaf") whosoever surprises his wife or one of his ascendants or descendants in the crime of adultery or in an unlawful bed, and kills her immediately or kills the person fornicating with her or kills both of them or attacks her or both of them in an assault that leads to death or wounding or injury or permanent disability.
2. Shall benefit from the same excuse the wife who surprises her husband in the crime of adultery or in an unlawful bed in the marital home and kills him immediately or kills the woman with whom he is fornicating or kills both of them or attacks him or both of them in an assault that leads to death or wounding or injury or permanent disability.
3. The right of lawful defence shall not be permitted in regard to the person who benefits from this excuse nor shall the provisions of "aggravated circumstances" ("zuruf mushaddida") apply.⁵⁸

The amendment grants female attackers the same reduction in penalty as men.⁵⁹

III. CULTURAL RELATIVISM LEGAL ANALYSIS

Until World War II, the protection of human rights of individuals was a sovereign prerogative of the state and, therefore, a domestic matter rather than an international concern.⁶⁰ This led to many atrocities during World War II.⁶¹ These atrocities motivated scholars and politicians to develop theories relating to human rights, including cultural relativism and universalism.⁶²

Cultural relativism and universalism are two essential theories in defining international human rights related to indigenous peoples.⁶³ Cultural relativism means that the culture is the norm by which the content of rights enjoyed by a community is determined.⁶⁴ Cultural relativists argue that the content of human rights in international human rights instruments reflects the values of countries that have more power over the substance of international human rights law.⁶⁵ In other words, the Western states.

On the other hand, under universalism, human rights are universal, absolute,

58. PENAL CODES OF ARAB STATES (Lynn Welchman trans.), *reprinted in* EXTRACTED PROVISIONS FROM THE PENAL CODES OF ARAB STATES RELEVANT TO 'CRIMES OF HONOUR' (2013).

59. Peratis, *supra* note 49, at 16.

60. Elizabeth M. Zechenter, *In the Name of Culture: Cultural Relativism and the Abuse of the Individual*, 53 J. OF ANTHROPOLOGICAL RES. 319, 319 (1997).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

and inalienable.⁶⁶ Universalism gives priorities to individuals rather than groups.⁶⁷ Under this concept, individuals (humans) are the only possible holders of rights.⁶⁸ This means that rights attach to every individual, regardless of that individual's culture, race, ethnicity, gender, or age.⁶⁹

The following are some examples of international conventions that address indigenous people, their communities, and their freedom and right to practice their culture.

A. International Labor Organization Convention No.169.

In 1989, more than twenty-five years ago, the International Labor Organization (ILO) adopted the Indigenous and Tribal Peoples Convention.⁷⁰ Article 2 of this convention states that governments shall cooperate with the concerned peoples to protect their rights and to guarantee respect for their integrity.⁷¹ This action includes measures to promote the full realization of the social and cultural rights of these peoples.⁷² This realization includes respect for social and cultural identities, customs, traditions, and institutions.⁷³ In applying the provisions of this convention, the convention parties must respect the social, cultural, religious and spiritual values, and practices of these peoples.⁷⁴ Moreover, Article 7 of this convention states that the peoples have the right to decide their own priorities for the process of development.⁷⁵ They also have the right to control their own economic, social, and cultural development to the extent possible.⁷⁶ In other words, the culture's supporters could argue that the ILO Convention affords protection to the indigenous peoples to commit honor killings because they are a part of traditional custom and because they have the right to govern themselves in autonomy. In fact, the convention states that this is the government's responsibility with the indigenous communities' participation.⁷⁷ Moreover, the convention states that "[i]ndigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the convention shall be applied without discrimination to male and female members of these peoples."⁷⁸

66. CLAIRE CHARTERS, *UNIVERSALISM AND CULTURAL RELATIVISM IN THE CONTEXT OF INDIGENOUS WOMEN'S RIGHTS* 10 (P. Morris et al. eds., 2003).

67. *Id.*

68. *Id.*

69. *Id.*

70. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382.

71. *Id.* art. 2(1).

72. *Id.* art. 2(2)(b).

73. *Id.*

74. *Id.* art. 5.

75. *Id.* art. 7(1).

76. *Id.*

77. *Id.* art. 2.

78. *Id.* art. 3(1).

B. United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is one of the most recent conventions addressing the rights of indigenous peoples. On September 13, 2007, UNDRIP confirmed that indigenous peoples are equal to all other peoples⁷⁹ and stated the importance of respecting the right of all peoples to be different.⁸⁰

According to Article 3 of UNDRIP, indigenous peoples have the right to self-determination. By virtue of that right, indigenous peoples are free to determine their political status and freely pursue their economic, social, and cultural development.⁸¹

In addition, Article 5 states that indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social, and cultural life of the State.⁸²

Honor killing is a part of the indigenous peoples' culture in Jordan. By applying these articles to honor killing, honor killing supporters can argue that honor killing is a major part of the indigenous peoples' culture in Jordan and indigenous peoples have the right to self-determine whether they want to continue using this practice or not.

Yet, after reading the whole convention, it is clear that some of the remaining articles conflict directly, or implicitly, with the commission of honor killing. For example, Article 44 states that "[a]ll the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals."⁸³ Additionally, Article 7 states that "[i]ndigenous individuals have the rights to life, physical and mental integrity, liberty, and security of person."⁸⁴ This article states a right to life for the indigenous peoples, but what if the main norm to achieve this culture is by killing the victim and losing a life? Moreover, Article 22 provides that "[s]tates shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination."⁸⁵ The honor killing in Jordan's culture represents a stark contrast with this article, leading to the threshold question of whether honor killing is a right of the peoples under UNDRIP. Is it a form of the indigenous peoples' right to self-determination or a form of violence and discrimination?

Article 34 states that "[i]ndigenous peoples have the right to promote, develop, and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices, and, in the cases where they exist, juridical systems

79. G.A. Res. 61/295, annex, U.N. Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

80. *Id.*

81. *Id.* art. 3.

82. *Id.* art. 5.

83. *Id.* art. 44.

84. *Id.* art. 7(1).

85. *Id.* art. 22(2).

or customs, in accordance with international human rights standards.”⁸⁶ In other words, international human rights standards have to be followed by indigenous peoples when they promote or develop their customs, spirituality, and traditions. To give a better explanation, the next section will address international human rights laws.

IV. INTERNATIONAL HUMAN RIGHTS LEGAL ANALYSIS

The United Nations (U.N.) came into existence on October 24, 1945.⁸⁷ The U.N. is an international political body run by western states; consequently, it values the western traditional beliefs more than the indigenous peoples’ traditional beliefs and norms.⁸⁸ However, U.N. Secretary General Kofi Annan expressed the U.N.’s attitude regarding violence against women by saying “[v]iolence against women is perhaps the most shameful human rights violation. It knows no boundaries of geography, culture or wealth. As long as it continues, we cannot claim to be making real progress towards equality, development, and peace.”⁸⁹

Violence against women takes many forms, such as rape, honor killings, and female infanticide.⁹⁰ As a result, many of the current international declarations, covenants, conventions, and resolutions push states to take a firm stance against honor killing. Ultimately, honor killing is a violation to the international human right to life, bodily integrity, and equality.

A. *Universal Declaration of Human Rights.*

In 1948, the U.N. promulgated the Universal Declaration of Human Rights⁹¹ which set forth, for the first time, that fundamental human rights must be universally protected.⁹² This declaration is considered one of the most important reference points for cross-cultural discussion of human freedom and dignity in the world today.⁹³

The Universal Declaration of Human Rights begins by confirming that people are equal in dignity and rights.⁹⁴ Article 2 emphasizes the importance of avoiding distinctions based on sex by stating that everyone has the rights and freedoms set forth in this declaration, without distinction of any kind.⁹⁵ Article 3 states that

86. *Id.* art. 34.

87. History of the United Nations, UN, <http://www.un.org/en/sections/history/history-united-nations>.

88. Meetings Coverage, U.N., Econ. and Soc. Council, Rights Violations of Indigenous Peoples ‘Deep, Systematic and Widespread’, Special Rapporteur Tells United Nations Permanent Forum, HR/5016 (Apr. 22, 2010).

89. U.N. WOMEN, VIOLENCE AGAINST WOMEN FACT SHEET NO. 4 (Apr. 14, 2016), <http://www.un.org/womenwatch/daw/followup/session/presskit/fs4.htm>.

90. *Id.*

91. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

92. *Id.*

93. Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1153 (1998).

94. Universal Declaration of Human Rights, *supra* note 91, art. 1.

95. *Id.* art. 2.

everyone has the right to life, liberty, and security of person.⁹⁶

Without a doubt, honor killing is seen as a clear violation to this declaration. On the other hand, some argue that regardless of what people believe, the cultural group whose practice is in question should be given respect for universal human rights norms, just as states are accorded the same respect.⁹⁷ Westerners view honor killing as a barbaric and illegal practice because they do not understand the value of this act in the indigenous culture. Cambridge University statistics states that one of every five indigenous women in Jordan believes that executing the honor killing of a woman is justified,⁹⁸ even when they themselves could be a potential victim. The reason for their attitude about honor killing is their understanding and value of the customs and notions of honor.⁹⁹

B. The International Covenant on Civil and Political Rights.

The International Covenant on Civil and Political Rights (ICCPR) entered into force on March 23, 1976.¹⁰⁰ This covenant confirmed the right to life as a universal declaration of human rights by stating that no one shall arbitrarily be deprived of his life¹⁰¹ and that this right to life shall be protected by law.¹⁰² This covenant also states the right to security of person and liberty.¹⁰³

On the other hand, the same covenant states, under Article 27, that minorities have the right to practice their own culture, religion, or language, and that the States shall protect this right.¹⁰⁴ However, does that give minorities the right to practice any culture, even if the culture violates one of the rights that the covenant protects? In other words, does this mean honor killing is legal if minorities commit it as a part of their culture, even if it is against the right to life and the right to security of person?

In fact, General Comment No. 28 states that persons belonging to minorities and enjoying rights under Article 27 should not violate the right to the equal enjoyment by women of any covenant rights or the right to equal protection of the law.¹⁰⁵

Obviously, honor killing is not protected by this covenant because it includes the equal enjoyment by women of any covenant rights, or the right to equal protection of the law.

96. *Id.* art. 3.

97. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 133 (2d ed. 2004).

98. Eisner & Ghuneim, *supra* note 13, at 405.

99. John Alan Cohan, *Honor Killings and the Cultural Defense*, 40 CAL. W. INT'L L. J. 177, 225 (2010).

100. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 172 (entered into force Mar. 23, 1976).

101. *Id.* art. 6(1).

102. *Id.*

103. *Id.* art. 9(1).

104. *Id.* art. 27.

105. Human Rights Comm., *General Comment No. 28: The Equality of Rights Between Men and Women (Article 3)*, U.N. Doc. CCPR/C/21/Rev.1/Add.10, ¶ 32 (Mar. 29, 2000).

C. *The Convention on the Elimination of All Forms of Discrimination Against Women.*

In 1979, the U.N. General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁰⁶ This convention entered into force on September 3, 1981.¹⁰⁷

Since that year, ratifying state parties are obligated to enforce CEDAW domestically.¹⁰⁸ The state must establish a policy of eliminating discrimination against women from any person, organization or enterprise.¹⁰⁹ The first article of CEDAW states that “the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field.”¹¹⁰ While CEDAW did not state that violence against women is a form of discrimination, the Committee on the Elimination of Discrimination against Women (the Committee) did¹¹¹ by stating that any act that affects women disproportionately or any violence based on gender is seen as a form of discrimination that Article 1 of the CEDAW prevents.¹¹²

Regarding honor killings specifically, CEDAW General Recommendation 19 states measures necessary to overcome family violence.¹¹³ One of these measures is legislation removing the defense of honor in regard to the murder or assault of a female family member.¹¹⁴

In 2007, the Committee suggested replacing protective custody (incarceration) with other measures to protect actual and potential honor killings victims without depriving them of their liberty.¹¹⁵ The Committee also urged Jordan to eliminate reductions in penalties that can benefit perpetrators of honor killings.¹¹⁶

106. *Short History of CEDAW Convention*, UN (May 11, 2016), <http://www.un.org/womenwatch/daw/cedaw/history.htm>.

107. *Id.*

108. Rachel A. Ruane, *Murder in the Name of Honor: Violence Against Women in Jordan and Pakistan*, 14 EMORY INT’L L. REV. 1523, 1563–64 (2000).

109. *Id.*

110. Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

111. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, 47th Sess., Oct. 4–22, 2010, U.N. Doc. CEDAW/C/2010/47/GC.2 (2010).

112. U.N. Div. for the Advancement of Women, U.N. Econ. Comm’n for Europe, U.N. Stat. Div., Rep. of the Expert Group Meeting, *Indicators to Measure Violence Against Women* 5 (Oct. 2007).

113. Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence Against Women*, 11th Sess., U.N. Doc. A/47/38 (Jan. 29, 1992).

114. *Id.* ¶ 24(r)(ii).

115. *Law and Policy on “Honor” Killings and Crimes*, ADVOCATES FOR HUMAN RIGHTS (last updated Nov. 2008), http://www.stopvaw.org/law_and_policy3.html.

116. *Id.*

D. Declaration on the Elimination of Violence Against Women.

The Declaration on the Elimination of Violence Against Women (DEVAW) was promulgated on December 20, 1993.¹¹⁷ The Declaration starts by defining the term "violence against women" to mean "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."¹¹⁸

DEVAW confirmed the exercise of due diligence to investigate and prevent violence against women in accordance with national legislation.¹¹⁹ It also punishes acts of violence against women, even if those acts are perpetrated by the state or by private persons.¹²⁰

Some politicians in Jordan have claimed that committing honor killing is one of their traditional practices. To illustrate, MP Mahmud al-Kharabsha, a member of Jordan's House of Representatives, said he accepted the logic of honor killings as an alternative means to clean the society of corruption.¹²¹ In other words, because it is a genuine manifestation of a community's culture, it is not a legal subject of scrutiny from an international human rights perspective. Nevertheless, in adopting DEVAW, the U.N. General Assembly opposed this idea, urging states to eliminate discriminatory treatment of women and not invoke tradition, custom, or religious consideration to avoid this obligation.¹²²

E. U.N. Resolutions

While the international society is working to eliminate honor killing and sees it as a sort of discrimination and violation against women, some of the indigenous people in Jordan see it as way to restore the social equilibrium and avoid feuds in local culture.¹²³ From their perspective, the local culture requires the shedding of blood to wash away the shame of sexual dishonor.¹²⁴

Consequently, change has to begin from the inside. That is the idea that the United Nations General Assembly Resolution 55/66 entitled, "*Working towards the elimination of crimes against women committed in the name of honor*," endorsed¹²⁵ by stating that it is necessary to involve society leaders like educators, religious leaders, chiefs, traditional leaders, and the media in public education.¹²⁶ It also

117. G.A. Res. 48/104, U.N. Doc. A/RES/48/104, Declaration on the Elimination of Violence against Women (Dec. 20, 1993).

118. *Id.* art. 1.

119. *Id.* art. 4(c).

120. *Id.*

121. Yotam Feldner, "Honor" Murders – Why the Perps Get Off Easy, MIDDLE E. Q. 41 (Dec. 2000).

122. Comm. on the Elimination of Discrimination against Women, *supra* note 113, ¶ 24(e).

123. Cohan, *supra* note 99, at 225.

124. *Id.* at 225–26.

125. *Sources of International Law Related to "Honour" Crimes and Killings*, UN WOMEN, <http://www.endvawnow.org/en/articles/729-sources-of-international-law-related-to-honour-crimes-and-killings.html>.

126. *Id.*

addressed creating institutional mechanisms to facilitate safe and confidential reporting for victims and others to report honor crimes.¹²⁷ GA Res 55/66 provides for encouraging, supporting and implementing measures to increase the understanding of legal and health professionals of the causes and consequences of honor-based violence.¹²⁸ In addition, GA Res 55/66 addresses the importance of providing and facilitating support services, such as appropriate protection, safe shelter, counseling, legal aid, rehabilitation and reintegration into society, for actual and potential victims.¹²⁹ These measures are in addition to intensifying legislative efforts.¹³⁰

Moreover, United Nations General Assembly Resolution A/RES/59/165 encourages working towards the elimination of crimes against women committed in the name of honor.¹³¹ GA Res 59/165 strengthens cooperation with intergovernmental and non-governmental organizations. Furthermore, it encourages the media to raise awareness on the issue.¹³²

V. MOVING FORWARD.

Jordan has received clear messages and suggestions from the international community to solve the violation against women that results from honor killing. This section illustrates Jordan's domestic efforts to execute its international obligations. It also illustrates Jordan's efforts to from a legal and social perspective and includes recommendations to help solve the honor killing problem.

A. Legal Perspective.

In 2001, Article 340 was changed to give the same rights to men and women, which means that any woman or man who kills or attacks his or her partner for the act of committing adultery or being in an "unlawful bed" benefits from a reduction in penalty.¹³³ This change is an example of gender equality, but it is not sufficient, in and of itself, to eliminate honor killing.¹³⁴ This is because the court, as the final interpreter of the law, will continue to use the same power to grant leniency to males who commit honor killings against women relatives.¹³⁵

There are several methods to eliminate honor killings. For example, parliament can repeal the Panel Code articles that give mitigating excuses to the killers or limit the judges' power in applying the mitigating excuse by changing the law. Moreover, judges can decide to apply the mitigating excuse in special conditions only and not

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. G.A. Res. 59/165, Working Towards the Elimination of Crimes Against Women and Girls Committed in the Name of Honour (Dec. 20, 2004).

132. *Id.* at 3(f).

133. Peratis, *supra* note 49, at 15.

134. Kathryn Christine Arnold, *Are the Perpetrators of Honor Killings Getting Away with Murder? Article 340 of the Jordanian Penal Code Analyzed Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 AM. U. INT'L L. REV. 1343, 1402 (2001).

135. *Id.*

expand the application of this article. For example, in applying Article 98, the murderer has to prove he committed his crime during great fury and if the murderer does not prove this, he is precluded from use of the mitigating excuse.

B. Social Perspective.

Society plays a major role in the continuance of honor killing. To eliminate honor killing, all society members have to cooperate and fight this culture. Organizations, commissions, individuals, and men as well as women can play an effective role against this problem.

Today, there are organizations and commissions in Jordan that care about women’s rights in general, such as the Jordanian National Commission for Women (JNCW). One of the most important roles of the JNCW was presenting CEDAW’s report to the United Nations’ CEDAW Committee.¹³⁶ Unfortunately, there is no domestic organization in Jordan that specializes in the honor killing issue. Establishing a domestic organization that focuses on honor killing will help in solve this issue. Moreover, hiring eligible indigenous people within this organization will give more credibility to this organization because it will help the society to accept the organization’s goal and not see the organization as a movement to westernize the society. This domestic organization should cooperate with all agencies and ministries in Jordan to solve the honor killing issue.

Educating all society members, men and women alike, about their equal rights will help to change the norms discriminatory to women in the society.¹³⁷ Obligating teachers to educate children about these rights by adding mandatory lessons about these rights in each level of school, especially the elementary level, will help raise a generation that believes in equality between men and women and shames honor killing.

Ultimately, honor killings have occurred as an essential part of the indigenous people’s culture for hundreds of thousands of years in Jordan. Changing this culture needs more effort than signatures on an international agreement or changing domestic laws. It needs to be treated as a national goal. Each member of this country has an obligation to convince the society members in general and the indigenous people specifically to dispose of this harmful culture. For example, the judge should not use his power to help the honor killing murderers get the mitigating penalty. Teachers should teach their students that there is no honor in killing someone. Mothers should raise their children without any discrimination based on the child’s sex. The final result of all these efforts will be a new generation without honor killing.

136. *Milestones*, JORDANIAN NAT’L COMM’N FOR WOMEN, http://women.jo/en/about.php?cat_id=9&type=0.
137. Arnold, *supra* note 134, at 1405.

ENVIRONMENTAL JUSTICE IN INDIA – THE NATIONAL GREEN TRIBUNAL

REVIEWED BY JUDGE MICHAEL RACKEMANN*

Gitanjali Nain Gill, *Environmental Justice in India – The National Green Tribunal* (1st ed. 2017), Routledge; ISBN: 9781138921108 (hbk); 238 pp. (hardcover).

Since the 1990s, there has been a global explosion in environmental law. It has blossomed in scope, content, reach, status, and significance. An even more recent phenomenon is the creation and proliferation of specialist environmental courts and tribunals (ECTs). This reflects a growing appreciation of the particular nature and character of environmental disputes and the special challenges and opportunities they present to those seeking to achieve efficient, effective, and beneficial dispute resolution.

Although longstanding specialist ECTs can be found in some countries, including Australia,¹ the vast majority of ECTs are of more recent origin. Indeed, most have been created in the last decade. This phenomenon has been the subject of renowned, valuable, and indeed ground-breaking work by Professor George (Rock) Pring and his wife Catherine (Kitty) Pring, who have undertaken comparative studies of ECTs in order to provide guidance for those looking to create or to improve them.² Otherwise, however, the academic community is still playing “catch-up” in producing a body of literature about ECTs, particularly when it comes to detailed and robust examinations of particular ECTs.

Against this background, the recent publication of *Environmental Justice in India – the National Green Tribunal* by Dr. Gill is a welcome and timely development. It offers an in-depth analysis of the National Green Tribunal of India (NGT), a recently formed ECT, with a broad jurisdiction and a reputation for an activist approach. It operates in the challenging context of a populous and rapidly developing emerging economic powerhouse, where the inevitable tensions in balancing ecological, economic, and social considerations in the pursuit of

* Judge Michael Rackemann was appointed to the Queensland Planning and Environment Court and the District Court of Queensland in 2004.

1. The Planning and Environment Court of the State of Queensland was first created more than 50 years ago. It has stood longer than the Land and Environment Court of New South Wales which is referred to, in the book, as being the world’s first.

2. See GEORGE (ROCK) PRING & CATHERINE (KITTY) PRING, *GREENING JUSTICE – CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNAL* (Access Initiative, 2009); GEORGE (ROCK) PRING & CATHERINE (KITTY) PRING, *ENVIRONMENTAL COURTS AND TRIBUNALS – A GUIDE FOR POLICY MAKERS* (United Nations Environment Programme, 2016).

ecological sustainability are profound. This is fertile ground for analysis, discussion, and debate. Dr. Gill has produced a valuable piece of work which responds to the challenges and opportunities of its subject matter.

The book reflects the author's extensive and meticulous field research. Dr. Gill has not contented herself with simply examining what the NGT is and what it does. She has studied the constitution, jurisdiction and processes of the NGT, the composition of its caseload, the nature(s) of the parties before it, the remedies it provides, and the jurisprudence emerging from its published decisions. She has also descended into the processes and procedures of the NGT to discover both the way it goes about its work and why. Her field studies for it include interviews with both legal and technical expert members of the NGT. Delving deeply into her subject in order to obtain an intimate understanding of the history, work, and ethos of the NGT, Dr. Gill conveys that understanding in an informative and engaging way.

It is noteworthy that the work does not commence with the institution of the NGT. Rather, it commences with an overview of the global perspective before tracing the historical background to the creation of the NGT. In the process, Dr. Gill surveys the judicial activism practiced by the Supreme Court [of India] in relation to public interest litigation and environmental protection by which it "has moved from being exclusively an adjudicator to embracing the role of policy-maker and, thereafter, superior administrator." This provides valuable context for an understanding of the establishment and operation of the NGT.

Chapter 4 of the book deals with normative principles. It usefully examines principles such as the precautionary principle, the polluter-pays principle, and sustainability. It provides an interesting insight (including by reference to case examples) into the NGT's application of those principles in the particular context of the challenges in India.

The ecological, economic, and social balance at the heart of ecological sustainability is not confined by the boundaries in a particular site, considered in isolation. It is a balance typically struck across a broader area (local, city-wide, regional, state, national, international, or global). Its pursuit may require, for example, one parcel of land within a broader area to be intensively developed (for economic wellbeing) whilst another is entirely preserved (for ecological reasons). A usual first step in considering whether a particular proposed development promotes or impedes ecological sustainability is an evaluation of the role which the subject site plays, or is intended to play, or should play, in promoting ecological sustainability at a relevant level or levels. In the case of Queensland, Australia, for example, there are statutory instruments which provide strategic guidance in this regard at the local, city-wide, regional, and state levels. It would be interesting to know more about what guidance is available to the NGT in evaluating the strategic importance of a particular site to the constituent elements of the ecological sustainability balance.

In Chapter 5, Dr. Gill identifies the importance of utilizing technical expertise

in the efficient, effective, and beneficial resolution of environmental disputes. That is a particular professional interest of mine.³ There are different ways of harnessing technical expertise. The NGT's approach is, apparently, to utilize its own internal experts. That is one model, but not the only available approach. Reliance on internal experts presents some problems including (but not limited to) that a tribunal will rarely have, within its ranks, a sufficient number or range of experts to cover all the issues which arise in all the cases which come before it or to cover those issues in sufficient depth. Dr. Gill quotes from judges of the NGT who have experienced difficulties in this regard and describes it as an issue to be addressed. Consideration could perhaps be given to the potential suitability, in the Indian context, of alternative models, used by other ECTs elsewhere, best to harness technical expertise without reliance, or sole reliance, on internal expertise.

In assessing the NGT's use of scientific expertise, Dr. Gill references the work of a political scientist (Schrefler) on the different roles experts may play in regulatory policy making and goes on to observe that the NGT uses expertise in each of these ways. Schrefler's work, for example, discusses the "strategic use" of expertise to, amongst other things, convince political overlords to extend the mandate of an agency or to justify and support predetermined or preferred policy positions. As Dr. Gill acknowledges, Schrefler's work does not expressly relate to courts or tribunals. Her use of it in this context is interesting, although it is debatable whether it is acceptable, or desirable, for a court or tribunal to use scientific expertise in all the ways discussed by Schrefler.

Dr. Gill assesses the overall success of the NGT by reference to academic work which observed four "essential dynamics" through which professionals "reconfigure" institutions and organizational fields. That is thought-provoking, although the work of those academics were not directed at assessing the success or otherwise of a court or tribunal and the justification for its use in that way is debatable.

It is evident that Dr. Gill has developed some admiration of the NGT. The book emphasizes its perceived strengths and achievements. The NGT is, however, not without controversy, including in relation to the extent of its perceived activism together with the extent to which it tends to blur the distinction between the judicial and executive arms of government.

As is discussed in Chapter 3, dealing with the interpretation and application of the *National Green Tribunal Act 2010*, the NGT adopts a robust and expansionist approach to the interpretation of its jurisdiction and powers. It has, for example, claimed (on the basis of implication) a judicial review jurisdiction not expressly conferred upon it. Further, it takes up matters on its own motion in response to things, such as newspaper reports, when there is no moving party seeking to invoke its jurisdiction. It makes wide ranging orders, including orders which appear to intrude significantly on policy and other matters conventionally regarded as the domain of the executive.

3. Michael E. Rackemann, *The Management of Experts*, 21 J. OF JUD. ADMIN. 168 (2012), http://jca.asn.au/wp-content/uploads/2013/10/P01_13_02_26-Rackemann-paper.pdf.

The book exemplifies and examines one case where, in response to reputed air quality concerns in Delhi, the NGT issued directions requiring government authorities to adopt an action plan including, amongst other things, measures banning vehicles fifteen years or older, banning diesel trucks from entering Delhi, and banning footpath parking. It subsequently gave further directions requiring the introduction of a cap on the number of vehicles to be registered, the provision of incentives for carpooling, and the imposition of higher registration fees and charges, including the imposition of congestion charges. Perhaps unsurprisingly, Dr. Gill reports that a number of the NGT's directions have variously been stayed, partially implemented, or not implemented at all.⁴

There are certain well recognized dangers which all specialist courts and tribunals should guard against. Those include the temptation to become overenthusiastic about vindicating the purposes for which the particular court or tribunal was set up, the temptation to exalt or pursue a particular purpose in too absolute a way, and the risk of becoming preoccupied in a way which leads to the development of distorted positions.⁵ Guarding against such risks and demonstrating impartiality are traditional cornerstones of the legitimacy and sustainability of any specialist court or tribunal. That requires decision making which is not only without fear, favor, or affection as between the parties to a particular dispute, but which is also objective, principled, fair-minded, and based on relevant statutory provisions and the proper application of the law otherwise. It involves a self-limiting approach. There is an important distinction between a decision maker's passion for the proper development and application of environmental law on the one hand and unrestrained environmental advocacy on the other.⁶ Courts and tribunals are conventionally concerned with the former and not the latter.

The creation of an ECT is no guarantee of its continued existence. Most longstanding ECTs with which I am familiar have been subject to regular review with a view to change or abolition. The sustained success of those longstanding ECTs generally owes much to the confidence which the broad cross section of stakeholders, be they environmental groups, developers, NGOs, government agencies, or others, have in their impartiality and to the respect their decisions command. ECTs which overindulge in zeal and activism may initially be cheered on as fighters of the good fight, but risk undermining sustained stakeholder and public confidence and legislative support. They can ultimately imperil the continued existence of the ECT itself to the ultimate potential detriment of the environment.

Dr. Gill acknowledges that the expansion of judicial activism, through environmental cases in particular, is widely debated and discussed in India and that

4. GITANJALI NAIN GILL, *ENVIRONMENTAL JUSTICE IN INDIA – THE NATIONAL GREEN TRIBUNAL* 92 tbl.3-1 (Routledge 2017).

5. *Kirk v. Indus. Relations Comm'r of N.S.W.*, 239 CLR 531, 589 (2010).

6. Michael E. Rackemann, Address to the International Conference on Global Environmental Issues (Mar. 15, 2015), <http://www.austlii.edu.au/au/journals/QldJSchol/2015/21.pdf>.

there are those with concerns about the NGT's robust and activist approach. The book states that the NGT's public credibility is widespread, but it would be interesting to read a more detailed, evidence-based analysis of the extent to which the NGT enjoys confidence across the broad range of stakeholders (and with legislators). It would also be interesting to know more about the extent to which the executive has respected and implemented those NGT decisions which appear to intrude on its domain. As the Prings state in the book's foreword, "Documenting ECT effectiveness and the political and policy acceptance of its decisions over time would be another ground-breaking study."

Whilst I have referred to a few aspects of the book which leave scope for a little more, I conclude by reaffirming my earlier observations about the considerable strengths of this excellent and ground-breaking work and the importance of its contribution. I wholeheartedly concur with the view of the Prings, expressed in the forward to the book, that Dr. Gill, "makes an extremely important contribution to the international literature on environmental justice and specialized environmental courts and tribunals." Dr. Gill's work warrants and rewards careful study and promises as much from her next work.



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Cite as: DENV. J. INT'L L. & POL'Y

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